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NOTES

The Role of the Michigan Attorney General in Consumer and Environmental Protection*

[The Attorney General] is not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.†

The increasing seriousness of consumer and environmental problems¹ calls for action by the state governments.² Any attempt on the part of a state to protect the public interest in these areas should be centered in the office of the state's attorney general. The attorney general's expertise in law enforcement and his position as the chief law enforcement officer of the state should allow him to combat consumer and environmental problems most effectively.

In an effort to clarify the role of the attorney general as public representative, this Note will examine the functioning of the office of the Michigan attorney general.³ After an analysis of the nature

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† C. CUSHING, A REPORT OF THE ATTORNEY GENERAL, SUGGESTING MODIFICATIONS IN THE MANNER OF CONDUCTING THE LEGAL BUSINESS OF THE GOVERNMENT, H.R. EX. DOC. NO. 95 AND S. EX. DOC. NO. 55, 33d Cong., 1st Sess. 6 (1854).

1. For discussions of the scope of consumer problems, see D. CAPLOVITZ, *THE POOR PAY MORE* (1963); W. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKETPLACE* (1968); P. SCHRAG, *COUNSEL FOR THE DECEIVED: CASE STUDIES IN CONSUMER FRAUD* (1972); Comment, *Representation of the Public Interest in Michigan Utility Rate Proceedings*, 70 MICH. L. REV. 1367 (1972); Comment, *Consumer Protection in Michigan: Current Methods and Some Proposals for Reform*, 68 MICH. L. REV. 926 (1970). For discussions of the scope of environmental problems, see SOCIETY AND ENVIRONMENT: *THE COMING COLLISION* (R. Campbell & J. Wade ed. 1972); *THE ENVIRONMENTAL HANDBOOK* (G. Debell ed. 1973); *THE POLLUTION READER* (A. DEVOS *et al.* ed. 1968); *THE ENVIRONMENTAL CRISIS* (H. Helfrich ed. 1970).

2. The National Advisory Commission on Civil Disorders concluded that unfair consumer practices and poor environmental conditions were significant contributory causes of the urban riots of the late 1960's. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 138-41 (1968).

3. For discussion of roles played by attorneys general in other states, see Baxley, *The State's Attorney*, 25 ALA. L. REV. 19 (1972); Burch, *Maryland's "Action" Program in Consumer Protection*, 42 STATE GOVT. 161 (1969); Christenson, *The State Attorney General*, 1970 WIS. L. REV. 298; Mindell, *The New York Bureau of Consumer Frauds and Protection—A Review of Its Consumer Protection Activities*, 11 N.Y. L.F. 603 (1965); Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRAMURAL L. REV. 1 (1969); O'Connell, *Consumer Protection in the State of Washington*, 39 STATE GOVT. 230 (1966); Richardson, *The Office of the Attorney General: Continuity and Change*, 53 MASS. L.Q. 5 (1968); Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General*, 29 OHIO ST. L.J. 897 (1968); Comment, *The Role of California's Attorney*

and extent of the attorney general's powers and of his current utilization of those powers, several proposals to increase his effectiveness will be discussed.

I. POWERS OF THE OFFICE OF ATTORNEY GENERAL⁴

In England the role of attorney general developed gradually from a position as the king's lawyer to that of the government's chief law enforcement officer. As chief law enforcement officer, the attorney general represented the government's interests in court and advised the different governmental departments on legal matters.⁵ In addition, he had the duty and power to represent the interests of the public.⁶ The offices of the colonial attorneys general were patterned after their English counterpart.⁷ The American Revolution brought few changes, as the new state attorneys general continued to act as the chief law enforcement officers of their respective

General and District Attorneys in Protecting the Consumer, 4 U. CAL. DAVIS L. REV. 35 (1971); Comment, *The Attorney General as Consumer Advocate: City of York v. Pennsylvania Public Utility Commission*, 121 U. PA. L. REV. 1170 (1973). See also J. Sebert, *Consumer Protection in the States and Local Communities*, in STAFF STUDIES PREPARED FOR THE NATIONAL INSTITUTE FOR CONSUMER JUSTICE ON 1. STATE AND FEDERAL REGULATORY AGENCIES, 2. MISCELLANEOUS REDRESS MECHANISMS 1-113 (1973); Note, *Consumer Protection by the State Attorneys General: A Time for Renewal*, 49 NOTRE DAME LAW. 410 (1973); Tannenbaum, *In Many States, Office of Attorney General Grows More Powerful*, Wall St. J., Jan. 7, 1972, at 1, col. 1 (eastern ed.).

4. See generally Bellot, *The Origin of the Attorney-General*, 25 LAW Q. REV. 400 (1909); Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304 (1958); Holdsworth, *The Early History of the Attorney General and Solicitor General*, 13 ILL. L. REV. 602 (1919).

During the Middle Ages in England, the king was represented by many different serjeants and counselors, each of whom represented the Crown only with respect to certain matters, only in certain courts, or only in specific geographic areas. 6 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 459-60 (2d ed. 1937); Cooley, *supra*, at 306. The office of the attorney general came into formal existence in 1472 when William Husee was appointed attorney general with the power to appoint deputies to act for him in courts of record throughout the realm. Bellot, *supra*, at 410. The office evolved slowly, acquiring a wide variety of powers as it grew. By the sixteenth century, the attorney general had assumed the role of the chief representative of the state in the courts. 6 W. HOLDSWORTH, *supra*, at 461.

5. 6 W. HOLDSWORTH, *supra* note 4, at 457-58, 460-61.

6. 1 HALSBURY, *THE LAWS OF ENGLAND* 9, ¶ 6 (1907) ("Where the right infringed is a public right, and where the grievance is a grievance to the whole community equally, . . . the appropriate remedy is by proceedings of a public nature, i.e., indictment or an action by the Attorney-General, as the guardian of the public's rights."); 2 RULING CASE LAW, *Attorney General* § 4, at 915-16 (1914) ("[I]t is generally held that, in exercise of his common law powers, an attorney-general may . . . intervene in all suits or proceedings which are of concern to the general public."). See also *Howard v. Cook*, 59 Idaho 391, 397, 83 P.2d 208, 211 (1938); *Capitol Stages, Inc. v. State ex rel. Hewitt*, 157 Miss. 576, 591, 128 S. 759, 763 (1930).

7. See generally O. HAMMONDS, *THE ATTORNEY GENERAL IN THE AMERICAN COLONIES* (Anglo-American Legal History Series, ser. 1, no. 2, 1939); Cooley, *supra* note 4, at 309-12. Despite the differences among the types of colonial governments, the powers and functions of the colonial attorneys general were very similar throughout the colonies.

states with the same common law powers and duties that they had possessed before the Revolution.⁸

The office of the attorney general in the territory of Michigan was created in 1807.⁹ The powers and duties given to the attorney general were to prosecute and defend all suits, both civil and criminal, for and against the United States or the territory, and to perform all official duties required by the legislature, the governor, and the courts. Under the territorial government, the common law prevailed except as changed by statute,¹⁰ and the attorney general presumably retained his common law powers.¹¹ When Michigan became a state in 1837, its new constitution continued the office¹² and provided that its powers and duties were to be "prescribed by law."¹³ Subsequent enabling legislation passed in 1838 expanded the powers and duties of the office beyond those it had possessed under the earlier territorial statutes.¹⁴ By 1919, the attorney general

8. Cooley, *supra* note 4, at 311-12. In most of the new states, the constitutions provided for the office of the attorney general. The attorney general was to be appointed by the governor, the legislature, or both. *See, e.g.*, DEL. CONST. art. 3, § 8, art. 8, §§ 1, 5 (1792); N.J. CONST. art. XII (1776).

9. Act of Jan. 29, 1807, No. 12, 4 Mich. Terr. Laws 15 (Supp. 1884).

10. *May v. Rumney*, 1 Mich. 1, 3-4 (1847); *In re Sanderson*, 289 Mich. 165, 174-75, 286 N.W. 198, 201-02 (1939).

11. The Michigan courts have held that the common law remains in full force except as specifically restricted by constitution or statute. *Bugbee v. Fowle*, 277 Mich. 485, 492, 269 N.W. 570, 572 (1936); *Stout v. Keyes*, 2 Doug. 184, 188-89 (Mich. 1845). They have also stated specifically that the attorney general retains his common law powers. *Mundy v. McDonald*, 216 Mich. 444, 450-51, 185 N.W. 877, 880 (1921); *People v. Karalla*, 35 Mich. App. 541, 544, 192 N.W.2d 676, 678, *motion for leave to appeal denied*, 386 Mich. 765 (1971); [1941-1942] MICH. ATTY. GEN. BIENNIAL REP. 309, 310. *See also* *People v. Miner*, 2 Lans. 396, 399 (N.Y. Sup. Ct. 1868) ("As the powers of the attorney-general, were not conferred by statute, a grant by statute of the same or other powers, would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly, or by reasonable intendment, forbade the exercise of powers not thus expressly conferred."). *See generally* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, REPORT ON THE OFFICE OF ATTORNEY GENERAL 32-61 (1971) [hereinafter OFFICE OF ATTORNEY GENERAL]; Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1 (1955); Note, *Attorney General—Common Law Powers Over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C. L. REV. 282 (1938).

12. MICH. CONST. art. 7, § 3 (1835). The new attorney general was to be appointed by the governor with the consent of the state senate for a term of two years. MICH. CONST. art. 7, § 3 (1835).

13. MICH. CONST. art. 7, § 3 (1835). In 1836, the legislature declared that the attorney general was to have the same powers and duties that he had had under the territorial government. Act of March 28, 1836, § 1, [1835-1836] Mich. Laws 43.

14. The powers and duties vested in the attorney general by that act included the power to appear for the state before the Michigan supreme court, or any other court, when requested to do so by the governor or the legislature in a case where the state was a party or otherwise interested, MICH. REV. STAT. pt. first, tit. III, ch. 1, § 20 (1838); the duty to consult with and advise the local prosecuting attorneys, MICH. REV. STAT. pt. first, tit. III, ch. 1, § 21 (1838); the duty to submit an annual report to the legislature, MICH. REV. STAT. pt. first, tit. III, ch. 1, § 21 (1838); the power to issue advisory

was empowered to intervene in any judicial action in order to protect the rights or interests of the state or the people of the state.¹⁵

Since the attorney general's role in any governmental system is dependent upon the powers and authority vested in his office, a detailed review of his powers must precede any discussion of how he can better protect the public in consumer and environmental areas.

A. *General Powers of the Michigan Attorney General*

As the state's chief law enforcement officer, the Michigan attorney general has substantial general powers to deal with all consumer and environmental problems. These include the powers to represent all state boards and agencies, to initiate cases to protect the public interest, and to intervene in litigation where it is necessary to protect the public interest.

The first major way in which the attorney general can protect the public interest is through his power to represent all state boards and agencies.¹⁶ This power is vested exclusively in the office of the attorney general, and no state agency or official may hire outside counsel to represent its or his interests.¹⁷ So long as the state boards and agencies are representing the public interest, the effect of the attorney general's representation of them is to further the public interest.

The attorney general, however, has been forced to recognize two limitations on this power. First, the lack of adequate resources—in particular, the lack of funds needed to employ additional assistant attorneys general and investigators—has occasionally led the attorney general to allow state agencies to hire outside counsel. The attorney general considers this practice illegal¹⁸ and rarely permits it. At the

opinions whenever requested to do so by a house of the legislature or any state office, MICH. REV. STAT. pt. first, tit. III, ch. 1, § 23 (1838); and the duty to recommend changes in the criminal jurisprudence system of the state to the legislature, MICH. REV. STAT. pt. first, tit. III, ch. 1, § 22 (1838).

15. Act of May 12, 1919, No. 232, § 1, [1919] Mich. Pub. Acts 418.

16. MICH. COMP. LAWS ANN. § 14.29 (1967). While the statute speaks only of representation for the elected state officials, it has always been assumed that it includes all state agencies. See note 17 *infra*.

17. See Act of Aug. 26, 1973, No. 130, § 23, [1973] Mich. Pub. & Loc. Acts —: "All legal services, including representation before courts and administrative agencies rendering legal opinions and providing legal advice to any state department or agency, shall be performed by the attorney general and no state agency shall employ or enter into a contract with any other person for such services." The Michigan courts and the attorney general had earlier reached the same result. See *Jennings v. State Veterinary Bd.*, 156 Mich. 417, 120 N.W. 785 (1909); [1926-1928] MICH. ATTY. GEN. BIENNIAL REP. 281.

18. See [1926-1928] MICH. ATTY. GEN. BIENNIAL REP. 281, 282-83 (1927):

We have had in this state at different times, specific statutes which authorized departments created for special purposes, to employ an attorney; but these statutes

present time no outside counsel are employed by any state agency, with the exception of the Civil Service Commission.¹⁹

A second, and more serious, limitation arises from conflict-of-interests problems. For example, since the assistant attorneys general are civil service employees,²⁰ the attorney general, despite his opinion that outside counsel are hired illegally, allows the Civil Service Commission to hire outside attorneys to represent it, in order to avoid the appearance of conflict.²¹ Another kind of conflict of interests occurs when the attorney general's office is called upon to represent two state agencies on opposite sides of a controversy. This problem is easily handled if each agency is represented by a separate division of the office, for the two divisions can simply work independently in presenting each agency's case. If the two agencies are normally represented by the same division, two solutions are possible. First, the attorney general may assign each agency's case to a different assistant attorney general within the division, with instructions that they work independently. This, however, does little to remove the appearance of a conflict. Alternatively, the attorney general may assign the representation of one of the agencies to the Special Litigation Division, while the other agency is represented by the regular division for that agency.²²

A conflict-of-interests problem may also arise when the attorney general perceives that the public interest is on one side of a controversy and a state agency is on the other. This situation can be handled in several ways. One solution, again, is to have the Special

have been regarded by this department as unconstitutional, and the authority has been permitted and to be exercised [sic] by such attorneys for such departments, only because this department has not had an appropriation sufficient to enable it to employ the necessary assistants to take charge of all the work.

The attorney general opposes the hiring of such outside counsel because it limits his power to influence and affect administrative policy within the state.

19. Interview with Ronald J. Styka, Assistant Deputy Attorney General, Michigan Attorney General's Office, Lansing, Michigan, August 27, 1973 [hereinafter Styka Interview].

20. *DeMaggio v. Attorney General*, 300 Mich. 251, 261, 1 N.W.2d 530, 533 (1942).

21. Styka Interview, *supra* note 19. The attorney general's office is currently seeking to terminate this practice. Telephone interview with Ronald J. Styka, Assistant Deputy Attorney General, Michigan Attorney General's Office, Lansing, Michigan, May 17, 1974.

22. Interview with Roderick S. Coy, Assistant Attorney General, Special Litigation Division, Michigan Attorney General's Office, Lansing, Michigan, August 27, 1973 [hereinafter Coy Interview]. Use of the Special Litigation Division is limited since the division has only two assistant attorneys general assigned to it and has many other responsibilities. See text accompanying notes 180-86 *infra*. One recent example of a conflict of interests was *Water Resources Commn. v. Chippewa County*, No. 1255 (Chippewa County, Mich., Cir. Ct., Aug. 31, 1973), where the defendant joined the State Highway Department as a third-party defendant. This meant that the attorney general's office was counsel for both the plaintiff, as the legal representative of the Water Resources Commission, and the defendant, as the representative for the Highway Department. Conflict-of-interests problems were avoided by having a separate division within the office represent each state agency.

Litigation Division represent the public interest by instituting an action against the agency or intervening on the side of a private party in litigation against the agency.²³ As a second alternative, the attorney general may attempt to persuade the agency to alter its position. If the agency will not change its stance, the attorney general may refuse to represent it with respect to that issue.²⁴ Finally, the attorney general may, if he feels that conflict cannot be properly handled by the procedures discussed above, permit the agency to secure outside counsel at its own expense; as suggested above, this procedure is very rarely used.²⁵

A second major source of the attorney general's power to protect the public interest is his statutory power to act, whenever necessary, to protect the rights and interests of the people of the state.²⁶ The common law similarly empowers him to act whenever necessary to protect the public interest.²⁷ Both the statutory and common law powers, however, are limited in that they do not allow the attorney general to recover damages on behalf of individual state citizens.

Recently, attempts have been made to overcome this limitation by use of the common law doctrine of *parens patriae*, under which the attorney general retains the power to act for the protection of lunatics, infants, and others who are unable to protect themselves.²⁸ In the past courts have allowed attorneys general to use this doctrine to secure injunctive or declaratory relief,²⁹ but they have not been willing to extend the power to allow the attorney general to recover damages on behalf of individual citizens.³⁰ It could be argued, however, that the doctrine should be expanded to include cases of corporate consumer fraud and pollution because the public, or at least

23. See note 22 *supra* for limitations on the use of the Special Litigation Division. But see *Arizona State Land Dept. v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960), where the court, in a state that does not recognize the common law powers of the attorney general, refused to allow the attorney general to bring an action on behalf of the public to enjoin the proposed sale of public lands by a state agency. See Casenote, 2 ARIZ. L. REV. 293 (1960).

24. Styka Interview, *supra* note 19. See text accompanying notes 289-94 *infra*.

25. Styka Interview, *supra* note 19.

26. MICH. COMP. LAWS ANN. §§ 14.28, .101 (1967).

27. See note 6 *supra*.

28. See 3 W. BLACKSTONE, COMMENTARIES *47, *426-27.

29. See, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Missouri v. Illinois*, 180 U.S. 208 (1901). The attorney general can act to protect such interests as the environment and the general economy of the state under the doctrine. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-60 (1972). The state may "sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests." 405 U.S. at 258.

30. "[T]he state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972). The Court seemed to be particularly concerned that allowance of the action might lead to double recoveries and to a substitute for class-action procedures. See 405 U.S. at 263-64, 266.

large portions of it, is incapable of protecting itself when faced with those problems.

While the Michigan courts have been silent on this question, a recent federal court decision has probably reduced the likelihood of such an expansion. In *California v. Frito-Lay, Inc.*,³¹ the state of California, as *parens patriae*, brought an action to recover treble damages on behalf of its citizens for injuries alleged to have been suffered as a result of a conspiracy to fix and maintain prices in violation of the Sherman Act.³² The court recognized that the royal prerogative function of *parens patriae* had passed to the states but could find no judicial recognition for using the doctrine "as a basis for recovery of money damages for injuries suffered by individuals."³³ The court also rejected the state's contention that "the practical inability of an injured citizen to bring an individual suit in his own behalf creates a . . . disability [comparable to that suffered by lunatics and infants] and warrants the establishment of a state prerogative to act for his protection."³⁴ The court stated that, "if the state is to be empowered to act in the fashion here sought . . . that authority must come not through judicial improvisation but by legislation and rule making."³⁵ Nonetheless, this possibility remains open to a court that is willing to use its traditional power to define and control the common law.

31. 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973). See also *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 131 (9th Cir. 1973). Cf. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

32. 15 U.S.C. §§ 1-7 (1970). For a discussion of the value of using *parens patriae* in these areas, see Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193 (1970); Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J. L. & SOC. PROB. 411 (1970).

33. 474 F.2d at 775.

34. 474 F.2d at 776. See also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265 (1972): "We note in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damages actions, and thus that denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. Private citizens are not as powerless, however, as the State suggests." The Court then noted the private citizens' right of action to secure injunctive relief and damages for antitrust violations without regard to the amount in controversy, the private class action, and the fact that the costs of litigation and attorneys' fees could be recovered in an antitrust suit for damages as proof that the public is not impotent. The Supreme Court did not, however, mention several other factors that might support a contrary finding. These include the recent limitations placed on the federal class action by the Supreme Court and other federal courts, see, e.g., *Zahn v. International Paper Co.*, 42 U.S.L.W. 4087 (U.S., Dec. 17, 1973); the small amount of each individual's damages, which would lead to no one citizen having enough incentive to initiate prolonged litigation; the high costs of such litigation, which, even though recoverable, will preclude action by the average citizen, who can not afford to invest in a speculative venture of this type; and the higher deterrent effect that would exist if the claims of citizens were collected and prosecuted by the state. See generally Malina & Blechman, *supra* note 32, at 213-17.

35. 474 F.2d at 777.

A third major power that the attorney general can use to protect the public interest is the power to intervene in any proceeding in which the public interest is threatened.³⁶ Specifically, the attorney general is "authorized and empowered to intervene in any action . . . in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state."³⁷ This reaffirms his common law power to intervene in an action in order to protect the public interest.³⁸ The Michigan courts have broadly construed the power so as to give the attorney general a large measure of control over a case once he has intervened.³⁹

They have concluded that the statute granting the power to intervene also allows the attorney general to initiate an action to protect the public interest, a power more useful than intervention in an affirmative program of consumer and environmental protection. In *In re Lewis' Estate*,⁴⁰ where the Attorney General petitioned the probate court for reimbursement to the state from the estate of a deceased mental patient for the costs of that patient's hospitalization in a state institution, the court held that "[w]hile a distinction may be drawn between intervening in a proceeding and instituting a suit there is a merger of purpose, by reason of public policy, when the interests of the State call for action by its chief law officer and there is no express legislative restriction to the contrary."⁴¹

These three broad powers—to represent all state agencies and to initiate or intervene in any judicial action where the public interest is involved—if properly used, give the attorney general the necessary standing to take action in any controversy involving consumer and environmental problems.

B. Consumer Protection Powers of the Attorney General

The attorney general is vested with a wide range of consumer protection powers. He has the authority to initiate criminal prosecutions for false advertising,⁴² for the obtaining of money under

36. MICH. COMP. LAWS ANN. § 14.101 (1967). A similar power is granted to the attorney general in MICH. COMP. LAWS ANN. § 14.28 (1967). The Michigan courts have held that this power is to be construed liberally. *People v. O'Hara*, 278 Mich. 281, 294, 270 N.W. 298, 303 (1936).

37. MICH. COMP. LAWS ANN. § 14.101 (1967).

38. See text accompanying note 27 *supra*.

39. E.g., *Russell v. Peoples Wayne County Bank*, 275 Mich. 415, 266 N.W. 401 (1936), where the court granted the attorney general's motion to dismiss after the attorney general had intervened in a bank liquidation proceeding.

40. 287 Mich. 179, 283 N.W. 21 (1938).

41. 287 Mich. at 184, 283 N.W. at 23. See *People v. Karalla*, 35 Mich. App. 541, 543-44, 192 N.W.2d 676, 677-78, *motion for leave to appeal denied*, 386 Mich. 765 (1971).

42. MICH. COMP. LAWS ANN. § 750.33 (1968). While the statute does not specifically

false pretenses,⁴³ and for the violation of any of fifty-four state statutes regulating the sale and marketing of various products and services.⁴⁴

The attorney general has an even broader range of powers under which he can bring civil actions to protect the consumer. For example, he can initiate actions for the violation of several regulatory statutes in the area of retail sales. Under the Home Improvement Finance Act⁴⁵ he can bring an action to restrain or prevent any violation of the provisions of the Act that regulate the terms of home-improvement contracts.⁴⁶ However, the Act only requires the full disclosure of the terms of the contract and does not attempt to regulate its substantive content.⁴⁷ Most of the retail-sales statutes are similarly designed to provide full disclosure and do not control the substance of the contracts.⁴⁸ While full-disclosure provisions

refer to the attorney general, his power of intervention would allow him to initiate actions under this statute. See text accompanying notes 40-41 *supra*.

43. MICH. COMP. LAWS ANN. § 650.218 (1968). While the statute does not specifically refer to the attorney general, his power of intervention would allow him to initiate actions under this statute. See text accompanying notes 40-41 *supra*.

44. For as complete a compilation of these statutes as is presently available, see Michigan Consumers Council, Summary of Consumer Protection Legislation (May 1969). Each of these statutes prohibits fraud or deception in the sale or marketing of a product or service. For example, under the Comminuted Meat Law, MICH. COMP. LAWS ANN. §§ 289.581-.592 (1967), as amended, MICH. COMP. LAWS ANN. §§ 289.581, .582, .583a (Supp. 1973), "[a]ny person or persons, firm or corporation, who shall publicly advertise in or by newspapers, window banners, hand bills, bulletins, bulletin boards, radio, television or otherwise, falsely with reference to the composition of products within the scope of this act manufactured, sold or offered for sale by him shall be deemed guilty of a misdemeanor." MICH. COMP. LAWS ANN. § 289.589 (1967). While these statutes do not specifically refer to the attorney general, his power of intervention would allow him to initiate actions under these statutes. See text accompanying notes 40-41 *supra*.

45. MICH. COMP. LAWS ANN. §§ 445.1101-.1431 (1967), as amended, MICH. COMP. LAWS ANN. §§ 445.1111, .1207, .1208 (Supp. 1973). Other statutes involving the regulation of retail sales include: Motor Vehicle Sales Finance Act, MICH. COMP. LAWS ANN. §§ 492.101-.138 (1967), as amended, MICH. COMP. LAWS ANN. §§ 492.102, .106, .109, .113, .122a, .136 (Supp. 1973); Motor Vehicle Installment Sales Contracts Act, MICH. COMP. LAWS ANN. §§ 566.301-.302 (1967); Retail Installment Sales Act, MICH. COMP. LAWS ANN. §§ 445.851-.872 (1967), as amended, MICH. COMP. LAWS ANN. §§ 445.851a, .852, .865 (Supp. 1973); Home Solicitation Sales Act, MICH. COMP. LAWS ANN. §§ 445.111-.117 (Supp. 1973).

46. MICH. COMP. LAWS ANN. § 445.1422(1) (1967).

47. The Michigan statutes do attempt to provide some substantive protection for the consumer by prohibiting the inclusion of certain clauses in retail-sales contracts. For example, waiver-of-defenses clauses are prohibited in retail-installment-sales contracts, MICH. COMP. LAWS ANN. § 445.864(f) (1967), and in the financing of motor vehicle sales, MICH. COMP. LAWS ANN. § 492.114(f) (1967). The rights of a holder in due course are limited by the Home Improvement Finance Act, MICH. COMP. LAWS ANN. § 445.1207(1) (1967). But see MICH. COMP. LAWS ANN. § 492.114(f) (1967), which explicitly states that the prohibited-clauses provisions of the Motor Vehicle Sales Finance Act "shall in no way impair or affect the rights and powers of a holder in due course of a negotiable instrument." See also MICH. COMP. LAWS ANN. §§ 445.864, 445.1206, 492.114 (1967). See generally Comment, 68 MICH. L. REV. 926, *supra* note 1, at 936-46.

48. See statutes cited in note 45 *supra*.

provide the consumer with the opportunity to compare credit terms and to choose the contract with the most favorable terms, their effectiveness can be blunted by high-pressure selling techniques or by the consumer's lack of the knowledge necessary to make a proper decision.⁴⁹ Without regulation of the substantive content of retail-sales contracts, the uneducated and the unwary are left without any real protection.⁵⁰

Michigan does have a fair trade practices act,⁵¹ but its scope is severely limited. It only prohibits the false representation of prices in order to create the appearance of a reduction in price at a sale,⁵² the sending of unsolicited merchandise to a consumer,⁵³ and the use of certain words when advertising goods for sale to the general public.⁵⁴ The state lacks a comprehensive act that would give the attorney general the power to prevent any unfair or deceptive consumer practice. Such an act would provide the substantive protection for the consumer that the disclosure acts fail to provide.⁵⁵

The present False Advertising Act⁵⁶ does give the attorney additional general powers to protect the public. He may initiate an action to enjoin the continuance of any violation of the Act.⁵⁷ Before such action can be taken, however, the attorney general must issue a cease-and-desist order that gives the respondent the

49. Comment, 68 MICH. L. REV. 926, *supra* note 1, at 934-36. See also Note, *Legal Knowledge of Michigan Citizens*, 71 MICH. L. REV. 1463 (1973).

50. Comment, 68 MICH. L. REV. 926, *supra* note 1, at 935-36.

51. MICH. COMP. LAWS ANN. §§ 445.101-.109 (1967).

52. MICH. COMP. LAWS ANN. § 445.106(a) (1967).

53. MICH. COMP. LAWS ANN. § 445.131 (Supp. 1973). The statute provides that the "receipt of any . . . unsolicited goods shall be deemed for all purposes an unconditional gift to the recipient." For a discussion of this provision, see Pooley, *Contracts, 1970 Annual Survey of Michigan Law*, 17 WAYNE L. REV. 563, 580-83 (1971).

54. MICH. COMP. LAWS ANN. §§ 445.101, .103-.105 (1967). The legislature declared that such words as "wholesale," "employee," "manufacturer," "miller," "wholesaler," and "broker," are improper and misleading when used in connection with the advertisement of products.

55. For comprehensive consumer protection acts of other states, see MO. ANN. STAT. §§ 407.010-.130 (Supp. 1972); N.J. STAT. ANN. §§ 56:8-1 to -220 (Supp. 1973); WASH. REV. CODE §§ 19.86.010-.920 (Supp. 1972). For a listing, complete through September 1971, of states with legislation that limits or restricts unfair or deceptive trade practices, see Lovett, *State Deceptive Trade Practice Legislation*, 46 TULANE L. REV. 724, 757-60 (1972).

56. MICH. COMP. LAWS ANN. §§ 445.801-.809 (1967), *as amended*, MICH. COMP. LAWS ANN. § 445.806a (Supp. 1973). The Act provides:

It shall be unlawful for any person knowingly to make, publish, disseminate, circulate or place before the public any advertisement which contains any statement or representation which is untrue, deceptive or misleading; or to advertise the availability of goods, wares or merchandise so as to misrepresent or unreasonably overstate the available supply in relation to reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.

MICH. COMP. LAWS ANN. § 445.801 (1967).

57. MICH. COMP. LAWS ANN. § 445.807(1) (1967).

opportunity to halt his activities within forty-eight hours.⁵⁸ The attorney general can also accept voluntary assurances of discontinuance in lieu of an action for an injunction.⁵⁹ This power appears to be sufficiently broad to allow him to prevent false and deceptive advertising given sufficient resources for enforcement.

The protection afforded by the above statutes is augmented by the attorney general's power to enjoin public nuisances. At common law, public or common nuisances were "such inconvenient or troublesome offenses as annoy the whole community in general, and not merely some particular person."⁶⁰ The damages were required to be common to all members of the public.⁶¹ The Michigan courts have recognized that the attorney general is a proper party to bring a public nuisance action.⁶² However, in all such actions the court will balance the equities in order to determine if the facts of the case require the issuance of an injunction.⁶³ Thus, the effectiveness of the attorney general's use of this power depends on the courts' willingness to grant injunctions.

A major expansion in the definition of a public nuisance, with implications for consumer protection, occurred in *Attorney General ex rel. Optometry Board of Examiners v. Peterson*.⁶⁴ The court held that the violation of a valid statute passed for the protection of the public health, safety, or welfare was a public nuisance.⁶⁵ The attorney general had brought the action to enjoin the de-

58. MICH. COMP. LAWS ANN. § 445.807(2) (1967).

59. MICH. COMP. LAWS ANN. § 445.809 (1967).

60. 4 W. BLACKSTONE, COMMENTARIES *167.

61. 3 W. BLACKSTONE, COMMENTARIES *219-20.

62. *Attorney General ex rel. Optometry Bd. of Examiners v. Peterson*, 381 Mich. 445, 465-66, 164 N.W.2d 43, 53 (1969); *Attorney General v. City of Howell*, 231 Mich. 401, 402-03, 204 N.W. 91, 91 (1925); *Attorney General ex rel. Township of Wyoming v. City of Grand Rapids*, 175 Mich. 503, 532-33, 141 N.W. 890, 900 (1913); *Attorney General ex rel. Muskegon Booming Co. v. Ewart Booming Co.*, 34 Mich. 462, 472 (1876). *But see* *Attorney General v. Hane*, 50 Mich. 447, 448, 15 N.W. 549, 549 (1883), where the court refused to allow the attorney general to bring civil action to restrain the maintenance of a mill dam that was alleged to be harmful to the public health. The court held that such a case should be prosecuted by the public and submitted to a jury.

63. *Roy v. Chevrolet Motor Co.*, 262 Mich. 663, 668, 247 N.W. 774, 776 (1933) ("A strict legal right, if incompatible with the equities of the case, does not necessarily entitle one to equitable redress."); *Fox v. Holcomb*, 32 Mich. 494, 495-96 (1875).

64. 381 Mich. 445, 164 N.W.2d 43 (1969). *See* Christenson, *supra* note 3, at 317-20, for a discussion of the use of an expanded doctrine of public nuisance.

65. While there is a general rule that equity will not enjoin the commission of a crime, courts have been willing to disregard the rule. *See, e.g., People ex rel. Kelley v. Marco Sales Co.*, No. 13622C (Ingham County, Mich., Cir. Ct., Dec. 8, 1972): "While courts generally do not interfere to prevent a breach of a penal ordinance or statute, they may properly do so under certain circumstances to prevent the continuance of a nuisance incidental thereto or arising therefrom." No. 13622C, opinion at 3. *See also* *Township of Garfield v. Young*, 348 Mich. 337, 341, 82 N.W.2d 876, 878 (1957), where the court said that, "if we have in truth a public nuisance, the fact that it is also a criminal act will not stay the chancellor's hand."

fendants' practice of examining eyes for contact lenses without the supervision of a licensed optometrist, oculist, or ophthalmologist. On appeal, the Michigan supreme court stated that

[a]t common law, acts in violation of the law constitute a public nuisance. Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare. The attorney general, acting on behalf of the people, is a proper party to bring an action to abate a public nuisance or restrain unlawful acts which constitute a public nuisance. The existence of a criminal or other penalty . . . will not oust equity from jurisdiction.⁶⁶

The court said that the attorney general had the power to sue to enjoin the violation of a statute if that violation resulted in a public nuisance. The dissenting justices, in an opinion by Justice Adams, also agreed: "It may be concluded that, while courts of equity will not customarily interfere to prevent the breach of a penal ordinance or statute, they may exercise equity jurisdiction to abate public nuisances affecting health, morals, or safety, or to protect a public property right or interest."⁶⁷ Justice Adams disagreed, however, with the court's position that the requisite showing of harm to the public could be presumed. In his examination of the facts, he could find no injury to the public as a result of the defendants' activities. The dissenters would have held that

[p]roof of a statutory violation of a regulatory statute that bears a reasonable relation to the public health and welfare, where such a statute contains criminal penalties that have not been pursued, where no injunctive remedy has been statutorily conferred, and where injury to the public by such violation or violations has not been made out, is insufficient to establish a public nuisance meriting the invocation of equity jurisdiction.⁶⁸

66. 381 Mich. at 465-66, 164 N.W.2d at 53. The majority did not cite any sources for its conclusions, but support can be found in English cases. *See, e.g.,* Attorney-General v. Shrewsbury (Kingsland) Bridge Co., 21 Ch. D. 752, 755-56 (1882); Attorney-General v. Cockermouth Local Bd., L.R. 18 Eq. C. 172, 178 (1874).

67. 381 Mich. at 457, 164 N.W.2d at 48.

68. 381 Mich. at 465, 164 N.W.2d at 53. Justice Adams' claim that the plaintiff must show injury to the public and that the injury should not be presumed is supported by an earlier opinion of the Michigan supreme court. In *Township of Garfield v. Young*, 348 Mich. 337, 82 N.W.2d 876 (1957), the court unanimously held that the plaintiff township could not secure an injunction for the violation of an ordinance passed to protect the public health, welfare, or safety unless it could prove actual injury to the public as a result of the violation. The cases can be distinguished in that *Peterson* involved a state statute, while *Young* involved a municipal ordinance. The court in *Peterson*, however, did not address the issue of presumption at all beyond categorically stating that it would presume injury to the public. *But see* Attorney-General v. Shrewsbury (Kingsland) Bridge Co., 21 Ch. D. 752, 756 (1882) (attorney-general can secure an injunction restraining illegal activities without showing actual injury to the public). The *Peterson* majority also failed to answer the question of whether the defendant had the opportunity to overcome the presumption by presenting evidence to show that there was no actual public injury.

Even assuming that the dissenters are correct and that harm to the public is not to be presumed but must be proved, the holding that the violation of a statute enacted to protect the public health, safety, or welfare constitutes a public nuisance enjoinable by the attorney general gives the attorney general the opportunity to control serious violations of Michigan's consumer protection statutes.⁶⁹ This power is limited by the courts' discretionary power to refuse to issue an injunction even if a public nuisance is properly shown.⁷⁰ Again, the effectiveness of the attorney general's program will depend to a substantial degree upon the cooperation of the courts.

Other weapons, which the attorney general can use to protect consumers from the acts of corporations that violate their charters by the misuse or abuse of their corporate powers, are his statutory⁷¹ and common law⁷² *quo warranto* powers. His primary *quo warranto* power is found in a statute that gives him the power to seek ouster for misuse, nonuse, or surrender of corporate powers.⁷³ A corporation that engages in any activity, including consumer fraud and pollution,⁷⁴ that is not granted to it by its charter may be ousted from the exercise of that activity. The attorney general also has the power to bring *quo warranto* actions for violations of several specific statutes. For example, he may bring such an action under Michigan's antitrust statutes.⁷⁵ These *quo warranto* powers are limited

The majority's opinion, a very brief one, may also be challenged on two other grounds. First, although the attorney general could have brought a criminal action against the defendant, the court did not discuss the inadequacy of the remedy at law. Second, the court failed to indicate whether it balanced the equities in order to determine if the facts of the case were such as to warrant the issuance of an injunction. Since the court issued an injunction, it must have decided both of these issues in favor of the attorney general. In the future, the attorney general should properly address these issues so that his activities will not be cut short by a tardy judicial recognition of hidden issues.

69. See Comment, *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. CHI. L. REV. 590 (1966).

70. See note 63 *supra*.

71. MICH. COMP. LAWS ANN. §§ 600.4501-4545 (1968). See also MICH. COMP. LAWS ANN. § 600.3601 (1968), granting the circuit courts jurisdiction to restrain corporations from exercising rights, privileges, and franchises not granted to them by the state.

72. 3 W. BLACKSTONE, COMMENTARIES *262-63. At common law, the attorney general had the authority, by a writ of *quo warranto*, to annul or vacate the charter of a corporation for violations of its charter because of misuse or abuse of corporate powers.

73. MICH. COMP. LAWS ANN. § 600.4521 (1968):

If a corporation has, by a misuser, nonuser, or surrender, forfeited its corporate rights, privileges and franchises, the judgment in an action for *quo warranto* shall oust and exclude such corporation from corporate rights, privileges and franchises, and may dissolve the corporation. In addition to such judgment or in lieu thereof (except in case of such surrender), the court may impose a fine not exceeding \$10,000.00 upon the corporation. The fine will not prevent further prosecution for any continuance or repetition of the conduct complained of.

74. For an example of the use of this *quo warranto* power, see *Attorney General v. Capitol Servs., Inc.*, 355 Mich. 545, 94 N.W.2d 814 (1959).

75. MICH. COMP. LAWS ANN. §§ 445.702-.703 (1967). Other specific statutes authorizing

in two respects. First, they may be used only against *corporate* consumer fraud or pollution. Second, they are limited by the marked reluctance of Michigan courts to allow their full exercise.⁷⁶ The statutes allow the courts to exercise discretion in deciding whether to order an ouster or, in the alternative, to order the defendant to pay a fine.⁷⁷ Fines are often an ineffective means of controlling fraud or pollution and can be looked upon by businesses as a cost of business.⁷⁸ In any case, the *quo warranto* power does provide an effective weapon for the attorney general in some cases. When dealing with situations where the only effective remedy is ouster or dissolution, the attorney general may persuade the courts to cooperate in his use of the *quo warranto* power to seek an ouster from any ultra vires actions that result in unfair consumer practices or pollution.

Additional power to deal with consumer problems can be found in Michigan's licensing and regulation statutes. The attorney general is expressly given the power to prosecute violations of some of these statutes.⁷⁹ Under other statutes, where no express grant of power is found,⁸⁰ the attorney general derives his power to prosecute violations from his general authority to represent all state agencies and boards. This broad power to prosecute and to prevent both the misuse of existing licenses and the unlicensed practice of a trade or profession is limited by the fact that the attorney general must generally wait for a request from the respective licensing agency

the use of the attorney general's *quo warranto* power upon violation include the statute prohibiting contracts in the restraint of trade, MICH. COMP. LAWS ANN. § 445.735 (1967); the statute regulating unfair discrimination and competition in the petroleum industry, MICH. COMP. LAWS ANN. § 445.797 (1967); and the fair-trade statute controlling the bakery and petroleum industries, MICH. COMP. LAWS ANN. § 445.180 (1967).

76. See, e.g., Attorney General *ex rel.* James v. National Cash Register Co., 182 Mich. 99, 126-28, 148 N.W. 420, 429 (1914).

77. The *quo warranto* statute was amended in 1961 to reflect this reluctance on the part of the courts to enforce ouster or dissolution. See Revised Judicature Act. No. 236, § 4521, [1961] Mich. Pub. & Loc. Acts 566. The statute now reads that the court "may dissolve the corporation." MICH. COMP. LAWS ANN. § 600.4521 (1968) (emphasis added). It formerly read that "judgment shall be rendered that such corporation be ousted . . . and that the said corporation be dissolved." 4 MICH. COMP. LAWS § 638.21 (1948) (emphasis added).

78. See note 250 *infra*.

79. See, e.g., MICH. COMP. LAWS ANN. § 338.525 (1967) (accountants); MICH. COMP. LAWS ANN. § 338.740 (1967) (foresters); MICH. COMP. LAWS ANN. § 338.572(2) (Supp. 1973) (land surveyors and architects); MICH. COMP. LAWS ANN. § 338.1044 (1967) (marriage counselors).

80. See, e.g., MICH. COMP. LAWS ANN. §§ 331.651-660 (1967), as amended, MICH. COMP. LAWS ANN. § 331.654 (Supp. 1973) (nursing homes); MICH. COMP. LAWS ANN. §§ 338.251-262 (1967), as amended, MICH. COMP. LAWS ANN. § 338.253 (Supp. 1973) (optometrists); MICH. COMP. LAWS ANN. §§ 338.1101-1131 (1967), as amended, (Supp. 1973) (pharmacists); MICH. COMP. LAWS ANN. §§ 451.201-219 (1967), as amended, MICH. COMP. LAWS ANN. §§ 451.211, .213, .217b (Supp. 1973) (real estate brokers).

or board before he may take action;⁸¹ his effective use of licensing statutes to protect the consumer will thus depend to a substantial degree upon the policies of each licensing agency. While there is in practice rarely any conflict between the attorney general's office and the licensing agencies as to when action should be taken,⁸² this potential limit on the attorney general's power does exist.

The attorney general is given a variety of other powers to deal with consumer problems. For example, he can prosecute for violations of Michigan's food and drug control statutes.⁸³ He has power to control the activities of corporations under the antitrust laws⁸⁴ and the authority to enforce securities statutes regulating public utilities.⁸⁵ The insurance industry is specifically subject to the attorney general's control,⁸⁶ and he also has the power to enforce the statutes controlling misrepresentation and deception in the advertising of condominiums.⁸⁷ Finally, the attorney general has the power to enforce the Land Sales Act,⁸⁸ which prohibits unfair and deceptive trade practices in the sale of land.

The powers discussed above give the attorney general a basis from which to attack consumer fraud problems. The lack of a comprehensive protection statute is partially overcome by the use of the *quo warranto* power to oust corporations from unfair and deceptive practices, and false advertising may be effectively controlled under the false advertising act. The lack of a comprehensive statute, however, cannot be totally overcome by the use of statutes that protect the consumer from only the most obvious of offenses.

C. Environmental Protection Powers of the Attorney General

The Michigan Constitution of 1963 declares the conservation and development of the state's natural resources to be of "paramount public concern" and gives the legislature an affirmative duty to protect the environment.⁸⁹ As the chief law enforcement officer, the

81. Styka Interview, *supra* note 19. See, e.g., MICH. COMP. LAWS ANN. § 338.1044 (1967) (marriage counselors). But see MICH. COMP. LAWS ANN. § 338.220a (1967) (dentists).

82. Styka Interview, *supra* note 19.

83. MICH. COMP. LAWS ANN. § 289.7 (1967).

84. MICH. COMP. LAWS ANN. §§ 445.702-.703, .707, .735 (1967).

85. MICH. COMP. LAWS ANN. § 460.302 (1967).

86. MICH. COMP. LAWS ANN. §§ 500.228, .230 (1967).

87. MICH. COMP. LAWS ANN. § 559.28(3) (1967).

88. MICH. COMP. LAWS ANN. §§ 565.801-.835 (Supp. 1973). The Act provides for enforcement through the Department of Licensing and Regulation.

89. MICH. CONST. art. 4, § 52: "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."

attorney general is charged with the enforcement of all laws that the legislature passes in fulfilling this constitutional mandate.

While the attorney general is charged with this duty, he has considerable discretion in deciding how to fulfill his role. It could be argued that he would be subject to a mandamus action for any breach of the duty to protect the environment.⁹⁰ The difficulty with such an argument is that his duty is not a ministerial one, and only the fulfillment of a ministerial duty can be compelled by the courts under Michigan law.⁹¹ The attorney general's discretion as a prosecutorial official makes mandamus difficult to obtain.⁹²

The traditional source of the attorney general's power to deal with pollution is his common law power to abate public nuisances.⁹³ This power has been incorporated into several statutory provisions. Any plant constructed or operated in violation of the Sewage Disposal Plant Act⁹⁴ is declared to be a public nuisance, and the attorney general is given the power to bring an abatement action.⁹⁵ Likewise, under the Water Resources Commission Act,⁹⁶ the discharge into the waters of the state of any substance that is or may become injurious to the public health or to the environment is prima facie evidence of the existence of a public nuisance, and the attorney general may bring an abatement action.⁹⁷ Under the Air Pollution Act,⁹⁸ the

90. Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1132 (1970).

91. *Taylor v. Ottawa Circuit Judge*, 343 Mich. 440, 444, 72 N.W.2d 146, 148 (1955); *Toan v. McGinn*, 271 Mich. 28, 34, 260 N.W. 108, 111 (1935). The Michigan courts also require the plaintiff in a mandamus action to show "a clear legal right to performance of the specific act sought to be compelled," *Iron County Bd. of Supervisors v. City of Crystal Falls*, 23 Mich. App. 319, 322, 178 N.W.2d 527, 529 (1970), and that the defendant has "the clear legal duty to perform" the act. *Toan v. McGinn*, 271 Mich. 28, 34, 260 N.W. 108, 111 (1935).

92. Mandamus will lie, however, in order to compel a public official to exercise the discretion vested in him. See, e.g., *Shipman v. State Live-Stock Sanitary Commn.*, 115 Mich. 488, 491, 73 N.W. 817, 818 (1898); *Cicotte v. County of Wayne*, 59 Mich. 509, 514, 26 N.W. 686, 687 (1886); *People ex rel. Brower v. Judge of Wayne County Court*, 1 Mich. 359, 362 (1850). See also *ICC v. United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474, 484 (1912); Robinson, *Securing Civil Rights in Michigan and the Growth of the Law*, 15 WAYNE L. REV. 3, 49-50 n.181 (1968). But see *Local 321, State, County & Municipal Workers of America v. City of Dearborn*, 311 Mich. 674, 679-80, 19 N.W.2d 140, 142 (1945) (dictum).

93. See 3 W. BLACKSTONE, COMMENTARIES *219-20; 2 J. STORY, EQUITY JURISPRUDENCE 202-04 (1836). See text accompanying notes 60-63 *supra*.

94. MICH. COMP. LAWS ANN. §§ 123.271-275 (1967).

95. MICH. COMP. LAWS ANN. § 123.274 (1967). The action may also be brought by "any one or more of the property owners within the city or village in which said building, plant, or work is attempted to be placed in violation of this act." MICH. COMP. LAWS ANN. § 123.274 (1967).

96. MICH. COMP. LAWS ANN. §§ 323.1-13 (1967), as amended, (Supp. 1973).

97. MICH. COMP. LAWS ANN. § 323.6(c) (Supp. 1973). The Act provides additional remedies. See MICH. COMP. LAWS ANN. § 323.10 (Supp. 1973).

98. MICH. COMP. LAWS ANN. §§ 336.11-36 (1967), as amended, MICH. COMP. LAWS ANN. §§ 336.12-15, .17-26, .28 (Supp. 1973).

attorney general's power to abate public nuisances caused by air pollution is preserved: "Nothing in this act . . . shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provision of this act . . . be construed as estopping individuals . . . from the exercise of their respective rights to suppress nuisances or to prevent or abate air pollution."⁹⁹ This statutory enactment of certain common law powers does not preclude the retention of the attorney general's general common law power to abate public nuisances.¹⁰⁰

The Michigan Environmental Protection Act (EPA)¹⁰¹ gives the attorney general broad power to take action to protect the air, water, and other natural resources of the state. Under the Act the attorney general, or any other person or legal entity, may bring an action for declaratory or equitable relief, including damages,¹⁰² for the protection of the environment.¹⁰³ Upon a showing that the defendant's activities are causing impairment or destruction of the environment, a court may grant temporary or permanent equitable relief or impose conditions upon the defendant to protect the environment.¹⁰⁴ The success that the attorney general, or any party, will have in using the EPA again depends to a great degree on the will and ability of the courts.¹⁰⁵ The courts are not required to grant relief whenever pollution is demonstrated; the Act provides that "[t]he court *may* grant temporary and permanent equitable relief"¹⁰⁶ Unless the attorney general can persuade the court to take action, the Act will not substantially add to his power to control pollution. The considerations that go into a court's decision under the Act will probably be very similar to those that go into its consideration of a public nuisance abatement action. At present, it is unclear whether the Michigan courts will interpret the Act to be a mandate for them to act in environmental matters.¹⁰⁷

99. MICH. COMP. LAWS ANN. § 336.34 (1967).

100. See note 11 *supra*.

101. MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (Supp. 1973). For discussion of the EPA and its operation during its first years, see Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004 (1972); Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience under the Michigan Environmental Protection Act* — ECOLOGY L.Q. — (1974).

102. While the draftsmen of the EPA did not envision the provision as allowing for a damage remedy, Interview with Prof. Joseph L. Sax, principal draftsman of the Michigan EPA, March 15, 1974, it appears that the equitable restitutionary remedy of return to the *status quo ante* would be available. Cf. text accompanying notes 169-70 *infra*. For example, if the defendant's operation of a landfill were enjoined under the EPA, the court could order him to restore the land to its original condition or to pay an amount of money sufficient to have the land restored to its original condition.

103. MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1973).

104. MICH. COMP. LAWS ANN. § 691.1204(1) (Supp. 1973).

105. Sax & Conner, *supra* note 101, at 1005, 1031-50.

106. MICH. COMP. LAWS ANN. § 691.1204(1) (Supp. 1973) (emphasis added).

107. For discussion of the judicial response to the EPA as a source of substantive

Under the EPA, the attorney general is also permitted to petition to intervene in any administrative or licensing proceeding, or any judicial review of such a proceeding, by filing a pleading that asserts that the proceeding, or the action for judicial review, involves conduct that has, or is likely to have, harmful effects on the environment.¹⁰⁸ If the agency or court finds that harmful effects will result, it cannot authorize or approve the conduct unless there are no feasible and prudent alternatives.¹⁰⁹ Under the Act the power to allow the attorney general to intervene is discretionary; the Act only states that the agency or court "may permit" an intervention.¹¹⁰ However, the attorney general may be able to intervene as a matter of right under his general intervention power.¹¹¹ While the EPA itself gives him no such right, it does give him a weapon in his efforts to persuade the courts to cooperate in an environmental protection program, for the Act certainly expresses a legislative intent to allow the attorney general to implement the mandate of the Michigan constitution.¹¹²

law, see Sax & Conner, *supra* note 101, at 1054-64; Sax & DiMento, *supra* note 101, manuscript at 105-10. See *Brotz v. Detroit Edison Co.*, No. 2201 (Livingston County, Mich., Cir. Ct., Dec. 26, 1973), where the court disagreed with a probate court holding, *In re Detroit Edison Co.*, No. 18146, at 11 (Livingston County, Mich., Probate Ct., Feb. 7, 1973), that the EPA was only procedural in nature and did not grant any substantive powers to the courts. No. 2201, opinion at 2. See Sax & DiMento, *supra*, manuscript at 50-51a. See generally Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-16 (1936).

108. MICH. COMP. LAWS ANN. § 691.1205(1) (Supp. 1973).

109. MICH. COMP. LAWS ANN. § 691.1205(2) (Supp. 1973).

110. MICH. COMP. LAWS ANN. § 691.1205(1) (Supp. 1973). The Act does not confer an absolute right upon the attorney general or any other person to intervene. In any case, the agency or court may permit the intervention. In addition, an agency or court may be under a constitutional obligation to allow intervention, see note 89 *supra*, but the Act does not require it to do so. In at least one case, *Wayne County Dept. of Health v. Chrysler Corp.*, No. 166-224 (Wayne County, Mich., Cir. Ct. Oct. 1, 1970), *aff'd.*, 43 Mich. App. 235, 203 N.W.2d 912, *motion for leave to appeal denied*, 388 Mich. 812 (1972), a court has held that intervention under the Act is permissive. The attorney general does, however, have the right to intervene under MICH. COMP. LAWS ANN. § 14.28 (1967), which provides, in part, that the attorney general "may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any . . . court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested." See Sax & Conner, *supra* note 101, at 1069-72.

111. MICH. COMP. LAWS ANN. §§ 14.28, .101 (1967).

112. The EPA provides that an action under the Act be brought "in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur." MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1973). See Sax & Conner, *supra* note 101, at 1072-76. However, the general statutes that apply to the attorney general allow him to bring suits in Ingham County. MICH. COMP. LAWS ANN. §§ 600.1631(a) (1968). The attorney general can use this venue power to pressure the violator by forcing him to present his case in a foreign tribunal. The defendant is, however, protected by the court rules from any venue location that would cause serious prejudice to his defense. See, e.g., MICH. CT. R. 403: "[T]he venue of any civil action properly laid . . . may be changed to any other county by order of the court upon timely motion by one of

The Water Resources Commission Act¹¹³ and the Air Pollution Act¹¹⁴ establish administrative commissions that have the power to create and enforce permit systems¹¹⁵ and to promulgate standards to control pollution.¹¹⁶ In addition, in October 1973, Michigan, and hence these commissions, received authority from the federal government, under the Federal Water Pollution Control Act,¹¹⁷ to assume the responsibility of issuing and enforcing permits regulating the discharge of pollutants into lakes and streams.¹¹⁸ This authorization not only allows the state to enforce the more strict standards of the federal Act but also brings a substantial amount of federal funding to implement the program.¹¹⁹ As the legal representative of both commissions, the attorney general has the power and the duty to enforce the state and federal standards and permit systems.

The permit systems themselves, however, may also create an obstacle to any program created by the attorney general to fight pollution, for it is not clear whether the attorney general may bring an action to enjoin an activity as a public nuisance where the business or corporation engaged in that activity is operating under a valid permit or within the standards of the regulatory agencies. The attorney general does have the power to intervene in the administrative proceedings in which the permits are issued and the standards established.¹²⁰ However, if he should feel that the public interest was

the parties, for convenience of parties and witnesses, . . . or when an impartial trial cannot be had in the county wherein the action is pending." In fact, the expression of a legislative intent that an environmental action be brought in the county where the pollution is occurring may persuade the courts to side with the defendant on any motion for change of venue.

113. MICH. COMP. LAWS ANN. §§ 323.1-13 (1967), *as amended*, (Supp. 1973).

114. MICH. COMP. LAWS ANN. §§ 336.11-36 (1967), *as amended*, MICH. COMP. LAWS ANN. §§ 336.12-.15, .17-26, 28 (Supp. 1973).

115. The permit systems for water pollution are established in MICH. COMP. LAWS ANN. §§ 323.5(b), 323.7 (Supp. 1973). The air pollution permit system is established in MICH. COMP. LAWS ANN. § 336.15(b) (Supp. 1973).

116. The Air Pollution Control Commission has the power under MICH. COMP. LAWS ANN. § 336.15(a) (Supp. 1973) to "[e]stablish standards for ambient air quality and for emissions."

117. 33 U.S.C. §§ 1251-376 (Supp. II, 1972).

118. 33 U.S.C. § 1342(b) (Supp. II, 1972).

119. The total amount of the federal grant to the state to assist in the enforcing of the strict pollution standards is approximately one million dollars for the fiscal year beginning July 1, 1973. Approximately fifty thousand dollars is restricted for use in legal enforcement of standards. At the present time, the money in the grant that is allocated for legal enforcement has not yet been appropriated to the attorney general's office. A conflict with the Civil Service Commission has resulted in a refusal by the Commission to authorize the positions for the EPNRD. Consequently, the money is being wasted. Interview with Stewart H. Freeman, Assistant Attorney General, Environmental Protection and Natural Resources Division, Michigan Attorney General's Office, Lansing, Michigan, Feb. 8, 1974.

120. MICH. COMP. LAWS ANN. § 14.28 (1967).

not sufficiently protected by such intervention, he may want to bring an action to enjoin those activities as a public nuisance.¹²¹ Fortunately, both the Water Resources Commission Act and the Air Pollution Act state that they shall not be construed so as to repeal any of the prior laws relating to pollution control.¹²² In addition, the Air Pollution Act explicitly allows municipalities to establish ordinances and regulations that are more strict than the minimum applicable requirements of the Act.¹²³ These provisions indicate that the two Acts are to serve as one more *additional* tool in the government's fight against pollution.

A recent Michigan case supports the proposition that the attorney general retains his common law power to abate public nuisances even if the defendant is operating in accordance with administrative regulations. In *White Lake Improvement Association v. City of Whitehall*,¹²⁴ an environmental protection association sought to enjoin the pollution of White Lake by the City of Whitehall and the Whitehall Leather Company. After agreeing that the plaintiff association had standing to challenge the city's action,¹²⁵ the court concluded that, while the Water Resources Commission Act did not provide an exclusive remedy for such pollution, it did provide a remedy that the plaintiff had not yet exhausted.¹²⁶ Relying on the doctrine of primary jurisdiction,¹²⁷ the court required the association to bring its com-

121. There may be several reasons why the attorney general might not want to use this power to bring an action after an administrative agency has dealt with an issue. First, such an action would threaten a close working relationship between the attorney general and the agency. Second, if the attorney general repeatedly challenged the actions of the agencies, he would effectively destroy the agencies' ability to control pollution through the permit system, for the public would properly conclude that it could no longer rely upon or base its activities on the permits issued by the agencies. Consequently, the attorney general should use his power sparingly, perhaps only when the agency is clearly wrong or when the agency's decision is motivated by factors other than environmental concerns. There has been only one recent case in which the attorney general has sought relief after agency action. That case was *Kelley v. National Gypsum Co.*, No. 1918 (Alpena County, Mich. Cir. Ct., Sept. 25, 1973). Telephone Interview with Stewart H. Freeman, Assistant Attorney General, Environmental Protection and Natural Resources Division, Michigan Attorney General's Office, Lansing, Michigan, March 13, 1974.

122. MICH. COMP. LAWS ANN. §§ 323.12 (water pollution), 336.35 (air pollution) (1967).

123. MICH. COMP. LAWS ANN. § 336.36(1) (1967).

124. 22 Mich. App. 262, 177 N.W.2d 473 (1970).

125. 22 Mich. App. at 271-74, 177 N.W.2d at 476-78.

126. 22 Mich. App. at 276-79, 177 N.W.2d at 479-80.

127. The doctrine of primary jurisdiction has been explained as follows:

[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally

plaint before the Water Resources Commission before it sought relief in the courts.¹²⁸

A party who, unlike the *White Lake* plaintiff, had complained to the Commission first would be required to seek judicial review of the Commission's action under the state Administrative Procedures Act.¹²⁹ Then the party may "initiate an action in equity to abate the nuisance if it still feels itself aggrieved and entitled to equitable relief";¹³⁰ the court said that the Water Resources Commission Act "contemplates that existing common law remedies are not abolished."¹³¹ The implication is that the attorney general would also be able to bring an action in equity if he first exhausted his administrative remedies.

Several recent circuit court decisions indicate that the Michigan Environmental Protection Act may provide some relief from the strict primary jurisdiction doctrine.¹³² The EPA provides, in part, that "[i]f administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court *may* remit the parties to such proceedings."¹³³ This section was expressly designed to relieve the courts from the dictates of primary jurisdiction in actions under the EPA.¹³⁴ Since the attorney general's powers to enjoin pollution under the EPA are largely coextensive with his powers to abate many public nuisances, the courts should likewise limit their application of the primary jurisdiction doctrine in common law actions to those cases where administrative action is clearly warranted. When faced with a situation similar to that presented in *White Lake*, a court may no longer be required to adhere

exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-75 (1952). See generally Convisser, *Primary Jurisdiction: The Rule and its Rationalizations*, 65 YALE L.J. 315 (1956); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964).

128. 22 Mich. App. at 282, 177 N.W.2d at 482.

129. 22 Mich. App. at 282, 177 N.W.2d at 482. See MICH. COMP. LAWS ANN. §§ 24.201-.315 (Supp. 1973).

130. 22 Mich. App. at 282, 177 N.W.2d at 482.

131. 22 Mich. App. at 279, 177 N.W.2d at 481.

132. See *Water Resources Commn. v. Chippewa County*, No. 1255 (Chippewa County, Mich., Cir. Ct., May 27, 1971) (Opinion on Defendant's Motion for Summary Judgment); *Lakeland Property Owners Assn. v. Township of Northfield*, 3 E.R.C. 1893 (Mich. Cir. Ct. 1972). Cf. *Kelley v. National Gypsum Co.*, No. 1918 (Alpena County, Mich., Cir. Ct., Sept. 25, 1973), discussed in text accompanying notes 202-05 *infra*. See also Sax & Conner, *supra* note 101, at 1019-27.

133. MICH. COMP. LAWS ANN. § 691.1204(2) (Supp. 1973) (emphasis added).

134. Sax & Conner, *supra* note 101, at 1019-20.

intractably to the principle of primary jurisdiction.¹³⁵ Because the predominant rationale behind the doctrine was to follow the legislative intent for uniformity and for utilization of agency expertise, this later expression of legislative intent should be read as a directive to the courts to free themselves from the strictures of primary jurisdiction in environmental matters and to base their decisions on the need to protect the environment.¹³⁶ The Water Resources Commission Act¹³⁷ and the Air Pollution Act¹³⁸ support this thesis in that they also contemplate a system with dual remedies.

In an equitable action to abate a public nuisance, the existence of a permit may cause further problems for the attorney general in that the defendant may claim its permit as a defense to the attorney general's action. The Michigan courts, however, have held that "[n]o state agency is free to maintain a nuisance, and hence it cannot permit or require another person to do so."¹³⁹

135. See *Lakeland Property Owners Assn. v. Township of Northfield*, 3 E.R.C. 1893, 1901 (Mich. Cir. Ct. 1972):

This Court is of the opinion that *White Lake*, and the rules set out therein, is no longer controlling in that [the Environmental Protection Act] denies the Water Resources Commission primary jurisdiction in matters such as are now before the Court. The primary jurisdiction doctrine was the controlling factor employed by the Court of Appeals in its disposition of *White Lake* but such doctrine was . . . employed in the absence of the language now found in [the Environmental Protection Act]. It should be understood herein that this Court does not disagree with the rationale for nor the necessity of the primary jurisdiction doctrine but merely points out that the same is not absolutely controlling herein.

136. In *Water Resources Commn. v. Chippewa County*, No. 1255 (Chippewa County, Mich., Cir. Ct., May 27, 1971) (Opinion on Defendant's Motion for Summary Judgment), the court noted that the administrative process normally should not be bypassed. However, the court continued: "[A]s the Court of Appeals indicated, there are no hard and fast rules for application of the 'primary jurisdiction' doctrine; and whether to apply it to a particular case depends upon many circumstances The interest of justice will not be served by the Court passing the problem back to the Water Resources Commission at this time." No. 1255, opinion at 5.

137. MICH. COMP. LAWS ANN. § 323.6 (Supp. 1973): "[I]n addition to the remedies provided for in this act [any violation] may be abated according to law in an action brought by the attorney general in a court of competent jurisdiction."

138. MICH. COMP. LAWS ANN. § 336.34 (1967).

139. *Ebel v. Saginaw County Bd. of Road Commrs.*, 386 Mich. 598, 607, 194 N.W.2d 365, 369 (1972). The court also said:

Compliance with the [public service] commission's orders for the installation and maintenance of certain [railroad crossing] warning devices are among the circumstances and certainly evidence the *jury* should consider in determining whether the railroad was negligent, but it cannot be said as a matter of law that compliance with such commission's order is to be equated as freedom from negligence.

. . . It cannot be said however that under all circumstances compliance with an order of the commission absolves a railroad from liability for maintaining a nuisance in fact.

386 Mich. at 606-07, 194 N.W.2d at 368-69 (emphasis original).

The EPA gives the courts the authority to examine the standards and rules promulgated by an administrative agency and, if necessary to protect properly the en-

The attorney general also has the authority under the Water Resources Commission Act and the Air Pollution Act to seek restitution for "the full value of the injuries done to the natural resources of the state and the costs of surveillance and enforcement by the state resulting from the . . . violation."¹⁴⁰ This remedy is in addition to injunctive relief and a prescribed fine and is supplemented by the attorney general's continuing common law power to recover damages for injuries done to the lands or property of the state.¹⁴¹

Several recent statutes give the attorney general additional powers to protect the natural resources of the state. For example, the Inland Lakes and Streams Act of 1972¹⁴² is, as its title indicates, designed to

vironment, to order and determine new standards. MICH. COMP. LAWS ANN. § 691.1202(2) (Supp. 1973), provides:

In granting relief . . . where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:

- (a) Determine the validity, applicability and reasonableness of the standard.
- (b) When a court finds the standard to be deficient, direct the adoption of a standard approved and specified by the court.

When the attorney general brings his action, the court now has the power to review the administrative standards *de novo*. The court would not be involved in the judicial review of an administrative order. *See* Lakeland Property Owners Assn. v. Township of Northfield, 3 E.R.C. 1893, 1901 (Mich. Cir. Ct. 1972). The court, upon finding that the administrative standards do not sufficiently protect the environment, may order the adoption of standards that it feels are proper. *See* 3 E.R.C. at 1901: "[The court] can direct the Water Resources Commission to adopt a different pollution standard without a judicial review of Commission proceedings wherein standards were adopted and by virtue of [the Environmental Protection Act] can direct the Commission to adopt different standards . . ."

140. MICH. COMP. LAWS ANN. §§ 323.10 (water pollution), 336.26 (air pollution) (Supp. 1973). There is an inconsistency in the two damage provisions with respect to the attorney general's power to bring an action for recovery without agency recommendation. In the air pollution provision, the attorney general is given the power to file an action for recovery "at the request of the commission." In a 1972 amendment to the Water Resources Commission Act the attorney general is simply given the power to bring the recovery action. Act of June 5, 1972, No. 159, [1972] Mich. Pub. & Loc. Acts 257 (codified at MICH. COMP. LAWS ANN. § 323.10 (Supp. 1973)). The legislature omitted the phrase "at the request of the department of conservation," which had been in the earlier version of the Act. Act of Oct. 29, 1965, No. 405, § 10, [1965] Mich. Pub. & Loc. Acts 825. Allowing the attorney general to bring an action for water pollution on his own initiative but not allowing him to do so in the air pollution field is illogical and calls for legislative correction. The proper approach is to allow the attorney general to bring an action for recovery on his own initiative in both cases.

141. At common law, the attorney general had the power to prosecute all actions necessary for the protection of the property and revenues of the Crown, 3 W. BLACKSTONE, COMMENTARIES *257-58, and the power to bring an action by information to recover damages for wrongs done to the land or to the possessions of the Crown. *Id.* at *261-62.

142. MICH. COMP. LAWS ANN. §§ 281.951-.965 (Supp. 1973). Other statutes designed to protect the natural resources of the state include the Shorelands Protection and Management Act of 1970, MICH. COMP. LAWS ANN. §§ 281.631-.645 (Supp. 1973); the Natural River Act of 1970, MICH. COMP. LAWS ANN. §§ 281.761-.776 (Supp. 1973); the Soil Erosion and Sedimentation Act of 1972, MICH. COMP. LAWS ANN. §§ 282.101-.117

protect and regulate Michigan lakes and streams. Enforcement of the Act is delegated to the Michigan Department of Natural Resources,¹⁴³ which is represented by the attorney general's office. The legislature has also recently enacted various statutes to control specific forms of pollution. For example, the 1969 Liquid Industrial Wastes Act¹⁴⁴ controls the disposal of liquid industrial wastes into Michigan's waters by requiring that persons engaged in discharging such wastes from industrial premises be licensed and bonded. While the initial enforcement powers are vested in the Water Resources Commission,¹⁴⁵ the attorney general's office, as the legal representative of the Commission, wields the enforcement power. His power is limited by the requirement that he must await agency referral. If a violation of the Acts constitutes a public nuisance, however, he should be able to act after he has resorted to the agency.

II. THE ATTORNEY GENERAL'S CURRENT UTILIZATION OF HIS POWERS

An examination of how the Michigan attorney general's common law and statutory powers are currently being used to protect the public interest involves, first, a description of the general departmental structure of the attorney general's office and, second, a survey of the office's current activities.

The department is currently separated into twenty-one divisions,¹⁴⁶ each of which represents several different state agencies and boards. At the present time, the Environmental Protection and Natural Resources Division (EPNRD) represents agencies and boards involved in environmental protection. The divisions dealing with consumer protection problems are the Consumer Protection and Charitable Trusts Division (CPD), the Licensing and Regulation Division (LRD), and the Special Litigation Division (SLD). This structure does not preclude activities in consumer and environmental areas by other divisions if such issues arise in the course of their representation of other agencies and boards. This allocation of

(Supp. 1973); the Mineral Well Act, MICH. COMP. LAWS ANN. §§ 319.211-236 (Supp. 1973); and the Wilderness and Natural Areas Act of 1972, MICH. COMP. LAWS ANN. §§ 322.751-763 (Supp. 1973).

143. MICH. COMP. LAWS ANN. § 281.963(1) (Supp. 1973).

144. MICH. COMP. LAWS ANN. §§ 323.271-280 (Supp. 1973). Other examples of recent legislation designed to control specific forms of pollution include the Cleaning Agents Act, MICH. COMP. LAWS ANN. §§ 323.231-236 (Supp. 1973); the Watercraft Pollution Control Act of 1970, MICH. COMP. LAWS ANN. §§ 323.331-342 (Supp. 1973); and the Sewage Treatment Facilities Act, MICH. COMP. LAWS ANN. §§ 323.111-128 (1967), as amended, (Supp. 1973).

145. MICH. COMP. LAWS ANN. §§ 323.279-280 (Supp. 1973).

146. Styka Interview, *supra* note 19. The Attorney General's office is created by MICH. COMP. LAWS ANN. §§ 16.150-154 (1967).

responsibility allows assistant attorneys general to specialize in one area of the law and thereby acquire the expertise necessary to provide effective protection.

The current activity of the divisions is limited to a great extent by inadequate resources.¹⁴⁷ In comparison with offices in other states, the Michigan attorney general's office is seriously understaffed in its consumer and environmental divisions.¹⁴⁸ No amount of organiza-

147. Styka Interview, *supra* note 19. For an example of an innovative attempt to mitigate the problems of limited resources, see Burch, *supra* note 3, at 164-65, where the Maryland Attorney General describes his use of law students in a work-study program. Partially funded by the federal government, the program provides the attorney general's office with the services of high quality law students at minimal cost to the state.

148. Currently Michigan has eight full-time assistant attorneys general, no investigators, and six clerical workers assigned to the Environmental Protection and Natural Resources Division. The attorney general has assigned three full-time assistant attorneys general, two investigators, one complaint examiner, and four clerical workers to the Consumer Protection and Charitable Trusts Division. These three assistant attorneys general must administer all charitable trusts, in addition to their consumer protection activities. Styka Interview, *supra* note 19.

Figures for environmental attorneys in other states' attorneys general's offices can be found in National Association of Attorneys General, Committee on the Office of the Attorney General Special Report, Environmental Control Questionnaires: Compilation of Responses 3-5 (August 22, 1973) [hereinafter Environmental Control Questionnaires]. The following table gives the figures for the environmental staffs of various states:

Number of Authorized Staff Positions in the Attorney General's Office
for Environmental Control Matters
(FT=Full-time; PT=Part-time)

State	Attorneys	Clerical-Secretary	Investigators	Additional Advisory Attorneys Housed in State Environmental Agencies
Alabama	1FT;3PT	1FT;1PT	None	1FT
California	9½FT	1FT;9PT	None	13FT
Connecticut	4FT	3FT	None	None
Florida	2FT	1FT	None	9FT
Illinois	19FT;17PT	10FT	7FT	14FT
Kentucky	2FT	2FT	None	4FT
Massachusetts	5FT	1FT	2FT	6FT
Michigan	8FT	5FT	None	None
Minnesota	4FT;2PT	2FT	None	7FT
Missouri	1FT;1PT	2PT	None	None
New Jersey	12FT	5FT	None	2FT
New York	15FT	7FT	2FT	22FT
Ohio	24FT	9FT	2FT	None
Pennsylvania	2PT	2PT	None	1FT
Texas	8FT	4FT	None	31FT
Virginia	3FT;1PT	1FT;1PT	None	None
West Virginia	3FT	2FT	None	None
Wisconsin	6FT	2FT;1PT	1FT	11FT

Figures for consumer attorneys in other states can be found in National Association of Attorneys General, Committee on the Office of the Attorney General and Consumer Protection Committee, State Programs for Consumer Protection 13 (Dec. 1973) [hereinafter State Programs]. The following table provides representative figures:

tion can overcome the problems inherent in a severe lack of resources.¹⁴⁹ However, the attorney general is attempting to protect the public interest as best he can.

The attorney general must accomplish two objectives if he is to protect the public interest effectively in these areas. First, he must secure the cessation of the harmful activities; second, he must secure restitution to both the public and the state for harm done.¹⁵⁰ The settlement of a case without a remedy that prevents the continuation of the harmful practice merely reduces the attorney general's action to a cost of doing business, and prosecution without restitution may discourage complaints and leave the public without an adequate remedy.¹⁵¹ The lack of resources has, of necessity, led to the placing

Number of Authorized Staff Positions in the Attorney General's Office
for Consumer Protection Matters
(FT=Full-time; PT=Part-time)

State	Attorneys	Clerical-Secretary	Investigators	Others*
Alabama	1PT	1PT	None	1FT
California	14FT	10FT	3FT	4FT
Colorado	3FT	3FT	2FT	4FT
Illinois	12FT;18PT	38FT;3PT	20FT;12PT	6PT
Kentucky	4FT	5FT	None	11FT
Maryland	2FT	4FT	5FT	3FT;15PT
Michigan	3FT	6FT	1FT	3FT
Minnesota	4FT	4FT	1FT	4FT
Missouri	2FT;2PT	3FT;3PT	4FT;1PT	3FT
New York	33FT;10PT	19FT;4PT	20FT;1PT	1FT
North Carolina	3FT	5FT	4FT	3FT;2PT
Ohio	12PT	10FT;2PT	9FT	8FT;3PT
Pennsylvania	18FT	38FT	31FT	3FT
Texas	15FT	8FT;2PT	None	3FT;5PT
Wisconsin	7FT	12FT;2PT	8FT	4FT;13PT

* Includes education specialists, complaint examiners, interviewers, and student aides.

149. Proper organization can, however, mitigate the problems that arise when a prosecutorial office is faced with a shortage of resources. Perhaps it would be worth the cost to reassign two or three assistant attorneys general from, for example, the highway division to consumer or environmental protection. While the representation provided to the Highway Department may suffer, the benefits gained by the addition of attorneys to the consumer and environmental divisions may outweigh the loss. The attorney general's office should seriously consider such a reallocation of resources.

150. Styka Interview, *supra* note 19. See OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 411 (John C. Danforth, Attorney General of Missouri):

I think that there are basically two theories for the operation of a consumer protection program. One . . . is that the objective of such a division is to procure refunds for consumers who complain to the division from businesses which may have engaged in deceptive practices. The other alternative is to view the consumer protection division less as an agency to procure restitution and more as an agency to prevent deceptive practices.

151. OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 411. See also W. MAGNUSON & J. CARPER, *supra* note 1, at 55-56, quoting Michael Frank, Attorney, Washington, D.C., legal aid office:

Many companies know they are violating the law, but they do it deliberately because they are sure that few poor people will show up in court to defend

of one goal over the other in some states.¹⁵² Fortunately, the approach taken by the Michigan attorney general's office¹⁵³ is to seek the fulfillment of both goals.

A. Consumer Protection Activities

The major activity of the attorney general with regard to consumer protection is the mediation of consumer complaints.¹⁵⁴ When a complaint is received in the Consumer Protection and Charitable Trusts Division, the complaint examiner and her staff review it and either request more information from the consumer or contact the businessman named. The businessman is informed that a complaint has been filed, is sent a copy of the complaint, and is asked to explain his actions. The CPD then asks him to refund the complainant's money and to agree to refrain from such activities in the future.¹⁵⁵ If the CPD succeeds, its goals of obtaining restitution and of stopping the fraudulent activity are fulfilled, and the case is considered closed.¹⁵⁶ The value of such an informal resolution is that, if properly supported by a program of immediate prosecution when informal agreement cannot be secured, it allows for the conservation of resources, quick results, and a wide range of activities. The informal agreements are, of course, not enforceable, and their efficacy is dependant upon the good faith of the violator. However, if the

themselves, and the company will get a default judgment. If they lose a case, the company won't appeal, because they don't want a precedent against them to be set and to appear on the books. It is little matter to these dishonest firms if they lose one small sale or suit. They are still in business, and they have their healthy margin of profit. We catch them on one; they fleece twenty.

152. OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 411.

153. Styka Interview, *supra* note 19.

154. Interview with Edwin M. Bladen, Assistant Attorney General, Consumer Protection & Charitable Trusts Division, Michigan Attorney General's Office, Lansing, Michigan, August 27, 1973 [hereinafter Bladen Interview].

155. During the year of 1973, the CPD handled 8208 citizen complaints and secured recoveries in the amount of \$215,651.74. In 1972, the division handled 7293 complaints and \$249,331.43 was recovered. In 1971, 6089 complaints were processed, with recoveries of \$165,959.45.

While the amounts recovered are quite substantial, they in no way approach the amounts lost by Michigan consumers every year to consumer fraud. It has been estimated that the Michigan consumers lose over a million dollars annually as a result of unfair and deceptive trade practices. Detroit News, Oct. 5, 1969, at 1-E, col. 4.

Another problem caused by the lack of resources in the CPD is that it takes approximately two weeks to handle a complaint. If sufficient resources were provided, the time would be two to three days. Interview with Mrs. Fern Wright, Complaint Examiner, Consumer Protection & Charitable Trusts Division, Michigan Attorney General's Office, Lansing, Michigan, February 8, 1974 [hereinafter Wright Interview].

156. The CPD estimates that approximately 40 per cent of the complaints result in a successful recovery for the consumer. The other 60 per cent end in reference to other units of government or reach a stalemate. Telephone Interview with Edwin M. Bladen, Assistant Attorney General, Consumer Protection & Charitable Trusts Division, Michigan Attorney General's Office, Lansing, Michigan, March 15, 1974 [hereinafter Bladen Telephone Interview].

attorney general adopts a policy of swift and forceful prosecution, where possible, upon the breach of such agreements, the threat of prosecution might be sufficient to compel compliance.

While the attorney general lacks the power to bring an action based simply upon an allegation of unfair or deceptive trade practices, if the businessman refuses to cooperate, the attorney general does have several alternatives. As previously noted,¹⁵⁷ he can use his recently expanded power to sue to abate public nuisances for violations of consumer protection statutes. In *People ex rel. Kelley v. Marco Sales Co.*,¹⁵⁸ the CPD successfully obtained an injunction restraining the defendant's use of the mails to conduct a lottery contrary to Michigan's lottery statute.¹⁵⁹ The defendant was sending Michigan residents punch cards that purportedly gave the recipient and his friends the opportunity to win a free grandfather chime clock. After concluding that the defendants were operating the scheme in such a way as to deceive and mislead Michigan consumers, the CPD was able to bring an action to enjoin the activities as a public nuisance under the *Peterson* rationale.¹⁶⁰

The case demonstrates another advantage of the *Peterson* rule. Because the defendant was an Illinois corporation with no agents or offices in Michigan, the attorney general was forced to use Michigan's long-arm statute¹⁶¹ to secure limited personal jurisdiction over it. Under the statute, the commission of a tort, or activities that lead to a tort, in Michigan is sufficient to provide jurisdiction.¹⁶² Because the violation of a statute passed to protect the public health, safety, or welfare—in this case, the lottery statute—is a public nuisance and thus a tort, the court found it had jurisdiction. The CPD's use of the expanded definition of public nuisance is a major part of the attorney general's consumer protection program.¹⁶³

157. See text accompanying notes 64-70 *supra*.

158. No. 13622C (Ingham County, Mich., Cir. Ct., Dec. 8, 1972).

159. MICH. COMP. LAWS ANN. § 750.372-376 (1967), as amended, MICH. COMP. LAWS ANN. § 750.372a (Supp. 1973).

160. See text accompanying notes 64-69 *supra*.

161. MICH. COMP. LAWS ANN. § 600.715(1) (1968). The court admitted that limited personal jurisdiction could not be secured under the general jurisdictional section, MICH. COMP. LAWS ANN. § 600.715(1) (1968), which provides that "[t]he transaction of any business within the state" will provide a sufficient basis for jurisdiction. No. 13622C, opinion at 6. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

162. MICH. COMP. LAWS ANN. § 600.715(2) (1968), which provides that "[t]he doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort" will provide a sufficient basis for limited personal jurisdiction. This section of the long-arm statute was held constitutional in *Woods v. Edgewater Amusement Park*, 381 Mich. 559, 165 N.W.2d 12 (1969). See also *Travelers Health Assn. v. Virginia ex rel. State Corporation Commn.*, 339 U.S. 643 (1950) (issuance of injunction restraining Nebraska firm from the use of the mails in Virginia to deliver insurance certifications held not a violation of due process); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

163. Bladen Interview, *supra* note 154.

The CPD has also been active under the authority given it by the deceptive advertising statutes.¹⁶⁴ For example, the division has attempted to prevent bait advertising in the sale of magazine subscriptions by Time Incorporated, and its subsidiary, Family Publications Service, Inc., who were luring customers by offers of "free" subscriptions. Their advertisements concealed the total costs of subscriptions and the duration of the subscription contracts. The CPD issued a cease-and-desist order, which notified the respondent that, unless the activities complained of were stopped within forty-eight hours, the attorney general would initiate an action to secure an injunction.¹⁶⁵ The respondents agreed to enter into a voluntary assurance of compliance, in which they agreed both to stop the deceptive advertising and to refund all monies paid by consumers for subscriptions.¹⁶⁶ If the respondents had not agreed to the voluntary assurance of discontinuance, the CPD could have brought an action under the Act to secure an injunction.¹⁶⁷ The advantage of securing a voluntary assurance of discontinuance is that the CPD can force the respondent to agree to refund monies gained as a condition of that agreement. If the CPD is forced to take the case to court in order to secure an injunction, the prospects of a recovery for the consumer are less, since the attorney general has no statutory power to sue for restitution on behalf of the public.¹⁶⁸

A recent California case,¹⁶⁹ however, may prove useful to the CPD

164. MICH. COMP. LAWS ANN. §§ 445.801-809 (1967), as amended, MICH. COMP. LAWS ANN. § 445.806 (Supp. 1973).

165. Notice to Cease and Desist, *In re* Time Inc., No. 70-1018 (Nov. 19, 1970). Other recent examples of notices to cease and desist include: *In re* World Wide Systems, Inc., No. 73-1001 (March 6, 1973) (respondent ordered to stop advertising that it had job positions available for truck drivers when it in fact had no such openings); *In re* New York Carpet World, No. 72-1001 (Jan. 10, 1972) (respondent ordered to discontinue advertising that claimed 50 per cent savings on carpeting that sold at a "regular price" of \$7.99 per square yard when carpeting's actual regular price was \$4.25 per square yard); *In re* Reader's Digest, No. 70-1020 (Dec. 2, 1970) (respondent ordered to cease advertising in a manner that created false and fraudulent impressions of endorsement or participation in promotional games). In 1973, 29 cease-and-desist orders were issued. In 1972, 6 were issued, and 12 were issued in 1971. Bladen Interview, *supra* note 154.

166. *People ex rel. Leonard v. Harrell*, No. 16693 (Genesee County, Mich., Cir. Ct., Nov. 25, 1970).

167. MICH. COMP. LAWS ANN. § 445.807(1) (1967). See, e.g., *People ex rel. Attorney General v. Koscot Interplanetary, Inc.*, 37 Mich. App. 447, 467-68, 195 N.W.2d 43, 53 (1972), where the Michigan court of appeals reversed a trial court decision refusing to issue an injunction against the defendant cosmetic corporation's marketing scheme, which violated the false advertising act by using "misrepresented facts, exaggerated claims and statistics, undisclosed facts, and false advertising."

168. Cf. text accompanying notes 28-35 *supra*.

169. *People v. Superior Court*, 9 Cal. 3d 245, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973). The court noted that "a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between parties, restoring if necessary the *status quo ante* as nearly as may be achieved In particular, in an

in its efforts to secure restitution for the consumer in conjunction with an action to enjoin deceptive advertising. The California supreme court held that the state attorney general could secure restitution for the deceived consumers in an action to enjoin violations of California's deceptive advertising act.¹⁷⁰ The Michigan courts have not yet decided if they have the power, under the traditional doctrine that an equity court may render full and complete relief once its jurisdiction has been properly invoked,¹⁷¹ to order a return to the *status quo ante* in an action by the attorney general under the Michigan deceptive advertising statute. Because its goal is to secure both restitution for the defrauded consumer and cessation of the deceptive practices, the CPD is currently attempting to establish that theory in Michigan.¹⁷²

Because of the lack of a comprehensive consumer protection act, the CPD uses the attorney general's *quo warranto* power to attack deceptive trade practices outside the reach of the deceptive advertising statute. These powers are presently used in two ways. If a corporation misuses its powers in a way that involves unfair trade practices, the CPD will bring an action to secure a partial ouster from those abusive practices. If a corporation uses otherwise legal means that are outside its granted powers to accomplish a purpose inimical to the public welfare, the CPD will bring an action for partial ouster from that ultra vires act.¹⁷³ The purpose of these *quo*

action by the Attorney General under [the false advertising act] a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make an offer to make restitution to the consumers found to have been defrauded." 9 Cal. 3d at 247, 507 P.2d at 1402, 107 Cal. Rptr. at 194. The court also said that it would not allow the lower court to award exemplary damages unless the courts were given explicit statutory authority to do so. See Comment, *Fraudulent Advertising: The Right of a Public Attorney to Seek Restitution for Consumers*, 4 Pac. L.J. 168 (1973).

170. CAL. BUS. & PROF. CODE § 17535 (West 1964), as amended, (West Supp. 1974). A 1972 amendment specifically allows a government attorney to bring a restitution action along with an action for an injunction.

171. J. STORY, COMMENTARIES ON EQUITY PLEADINGS §§ 72, 174 (1838). See *Hecht Company v. Bowles*, 321 U.S. 321, 329 (1944); *Camp v. Boyd*, 229 U.S. 530, 551 (1913) ("A court of equity ought to do justice completely, and not by halves.").

172. See *People ex rel. Kelley v. Anderson*, No. 15875-C (Ingham County, Mich., Cir. Ct., filed Oct. 1, 1973), where the attorney general, using *Peterson's* expanded definition of public nuisances, see text accompanying notes 64-69 *supra*, is seeking an injunction for the abatement of a public nuisance—the violation of the deceptive advertising act. The attorney general has also asked that the court "order that the *status quo ante* be restored as near may be, including ordering Defendants herein to refund to each and every person within the State of Michigan such sums of money as they may have expended as the result of reliance on the representations and advertisements of Defendants." No. 15875-C, complaint at 6.

173. Bladen Interview, *supra* note 154. For an example of a partial ouster action, see *Michigan Mobile Homeowners Assn. v. Chateau Enterprises, Inc.*, No. X72-4678 (Macomb County, Mich., Cir. Ct., Oct. 6, 1972), where the attorney general intervened and sought an injunctive order excluding the defendants "from exceeding the authority expressed in defendants' corporate charters and abusing or misusing the franchise power granted by the State of Michigan." No. X72-4678, complaint at 2.

warranto actions is not necessarily to secure a total ouster of the corporation, although such action is possible if the CPD feels that the defendant is incapable of engaging in business without involving itself in unfair practices.¹⁷⁴ Rather, the goal is only to obtain a partial ouster from the unfair practices.¹⁷⁵ The use of the *quo warranto* power alone will not provide any form of restitution to the consumer, unless the attorney general can persuade the court to agree to a return to the *status quo ante* as a part of its injunctive order of ouster. Consequently, the CPD uses the threat of *quo warranto* actions to secure voluntary consent judgments—which, *inter alia*, require restitution.¹⁷⁶

The CPD is active in other areas of consumer protection. For example, it has been involved in the policing of unconscionable contracts,¹⁷⁷ in court proceedings on the question of the proper venue in a debtor-creditor relationship (must the creditor sue the debtor where the debtor resides or where the creditor has its place of business?),¹⁷⁸ and in the prevention of pyramid-sales schemes.¹⁷⁹ These

174. For a recent example of an action seeking total ouster, see *People ex rel. Kelley v. Bay Shore Dev. Corp.*, No. 2676 (Grand Traverse County, Mich., Cir. Ct., filed Dec. 28, 1971), where the attorney general is asking for total ouster because of the defendant's alleged unfair and deceptive trade practices.

175. Bladen Interview, *supra* note 154.

176. See, e.g., *People ex rel. Kelley v. American Central Corp.*, No. 15398-C (Ingham County, Mich., Cir. Ct., Aug. 23, 1973) where the attorney general forced the defendant to comply with the provisions of the Michigan Land Sales Act, MICH. COMP. LAWS ANN. §§ 565.801-835 (Supp. 1973). The defendant also agreed to submit to an arbitration panel all unsettled rescission claims of defrauded consumers.

177. See, e.g., *People ex rel. Kelley v. Cadillac Outfitting Furniture Co.*, No. 191336R (Wayne County, Mich., Cir. Ct., Nov. 21, 1972), where the attorney general brought a *quo warranto* action against a furniture company soliciting inner-city business in Detroit, alleging that the defendant's business practices were unfair, unconscionable, and racially discriminatory. The attorney general secured a consent dissolution of the company and an injunction against the defendant excluding it from engaging in mercantile or credit business.

The attorney general has also been active in enforcing the Michigan Retail Installment Sales Act, MICH. COMP. LAWS ANN. §§ 445.851-872 (1967), *as amended*, MICH. COMP. LAWS ANN. §§ 445.851a, .852, .865 (Supp. 1973). See, e.g., *In re Domestic Credit Corp.*, No. 11647-C (Ingham County, Mich., Cir. Ct., April 30, 1970) (defendants voluntarily agreed to discontinue the inclusion of prohibited conditions and provisions).

178. See, e.g., *Baby Prods. Co. v. Piskoti*, No. DA-201 (Oakland County, Mich., Cir. Ct., Sept. 21, 1972) (Stipulation), where the plaintiff stipulated that it would permanently "refrain in all future litigation from filing any suit to enforce any of Plaintiff-Appellee's contracts in any District Court except the District Court in which the defendant of said litigation resides." No. DA-201, stipulation at 1. This concession by the plaintiff is important for three reasons. First, it prevents this particular company from using venue statutes to pressure the consumer. Second, and more importantly, it is a strong precedent for future action by the attorney general. Third, it serves as notice to corporations that the attorney general will act if venue statutes are used improperly. The stipulation was incorporated into an injunction by order of the court.

179. See, e.g., *People ex rel. Kelley v. Dare To Be Great, Inc.*, No. 6650 (Washtenaw

activities, with those discussed above, have provided a measure of protection for the Michigan consumer. Again, the degree of this protection is limited by the lack of a comprehensive consumer protection act and by the limited resources available to the CPD.

The Special Litigation Division is also active in consumer protection. Created in 1968, the SLD is primarily involved in representing the public at rate hearings before the Michigan Public Service Commission.¹⁸⁰ The attorney general established the division because the Public Service Division of his office, the legal representative of and advisor to the Public Service Commission, was not adequately representing the public interest at Commission hearings.¹⁸¹ Since 1969, the SLD has intervened in every major rate-increase hearing before the Commission in an effort to hold down increases in Michigan's public utility rates.¹⁸² While the SLD intervention has been somewhat effective,¹⁸³ the division is not properly staffed and funded. The Commission is now capable of handling three major rate-increase hearings simultaneously,¹⁸⁴ and the effectiveness of the SLD's intervention power has thus been severely decreased, because its two assistant attorneys general cannot juggle three major hearings. The SLD also lacks the funds to hire the expert witnesses needed to rebut the testimony of the utilities' expert witnesses.¹⁸⁵ For the present, the best that the SLD can do is to attempt to offset the massive investments of time and efforts by the utilities by pointing out the availability of alternative methods of calculating profit margins. The problem has been magnified recently, for the SLD now also represents the state's interest in proceedings before the Federal Power Commission and the Federal Energy Office. The division was given these new responsibilities without a corresponding increase in staff and financial resources.¹⁸⁶

The Licensing and Regulation Division represents each indi-

County, Mich., Cir. Ct., Dec. 4, 1972) (attorney general secured temporary and permanent injunctive relief against defendant's chain-referral marketing scheme).

180. Coy Interview, *supra* note 22. See generally Comment, 70 MICH. L. REV. 1367, *supra* note 1. Cf. Comment, 121 U. PA. L. REV. 1170, *supra* note 3.

181. Coy Interview, *supra* note 22. Cf. Comment, 70 MICH. L. REV. 1367, *supra* note 1, at 1379-81.

182. The total number of interventions through 1973 is 42. Coy Interview, *supra* note 22.

183. See, e.g., Michigan Bell Tel. Co., No. U-4293 (Mich. Pub. Serv. Commn., Dec. 21, 1973), where positions taken and supported solely by the attorney general's office were adopted by the Michigan Public Service Commission and resulted in a savings of 9,708,000 dollars to the public.

184. Coy Interview, *supra* note 22.

185. Coy Interview, *supra* note 22.

186. Telephone Interview with Roderick S. Coy, Assistant Attorney General, Special Litigation Division, Michigan Attorney General's Office, Lansing, Michigan, March 14, 1974.

vidual licensing board's staff in proceedings for disciplinary action under the licensing statutes, for revocation of existing licenses, and for prevention of the unlicensed practice of a trade or profession. For example, the LRD currently has five cases pending in Detroit against building contractors.¹⁸⁷ The division is seeking to enjoin the contractors from further business activities because the attorney general's office has determined, as a result of consumer complaints, that they are abusing their licenses or operating their businesses without a license. The attorney general has also requested the courts to appoint a receiver to take over the assets of the contractors and to distribute them to those who have been defrauded.

The LRD has several advantages over the CPD in protecting the public interest. First, many of the licensing statutes provide that the licensing agency, and consequently the LRD, has the power to compel the attendance of witnesses at licensing proceedings.¹⁸⁸ The CPD does not have the power to subpoena witnesses in its investigations.¹⁸⁹ Second, the power to revoke a businessman's license is easier to exercise than the power to bring a *quo warranto* or public nuisance action. These advantages have led the attorney general's office to conclude that, whenever a businessman who is licensed by the state is engaged in unfair consumer practices, the LRD is the proper division to take action.¹⁹⁰

The attorney general's office is involved in other consumer protection programs. The other divisions presently handle consumer interest litigation when the agency they represent has an interest in the litigation,¹⁹¹ and the office publishes several pamphlets, in both English and Spanish, informing consumers of their rights under Michigan laws.¹⁹² In order to encourage local action against consumer

187. Styka Interview, *supra* note 19. See, e.g., *Kelley ex rel. Department of Licensing & Regulation v. White*, No. 73-229-230 CZ (Wayne County, Mich., Cir. Ct., filed Feb. 12, 1973).

188. See, e.g., MICH. COMP. LAWS ANN. §§ 338.557 (architects, professional engineers, and land surveyors), 338.502 (accountants) (1967).

189. Bladen Interview, *supra* note 154.

190. Styka Interview, *supra* note 19.

191. For example, the Commerce Division of the attorney general's office has represented the Department of Agriculture in controlling the quality of food in Michigan. See, e.g., *City Smoked Fish Co. v. Department of Agriculture*, 47 Mich. App. 125, 209 N.W.2d 267 (1973), where the plaintiff challenged a department regulation requiring a higher salt content for packaged fish than was required by federal regulations. The court upheld the state regulation, but only to the extent that it regulated food processed for distribution within Michigan. However, in *Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972), the attorney general and the Department of Agriculture failed in an attempt to protect Michigan's strict requirements for the marketing, labeling, packaging, and ingredient contents in hot dogs and sausages. The court held that the Federal Whole Meat Act, 21 U.S.C. §§ 601-95 (1970), pre-empted the field and that the state regulations could not be enforced.

192. See, e.g., "The Michigan Consumer Survival Manual" (Manual de Super-

problems, the CPD has published a manual entitled "A Short Course on Consumer Protection Laws of Michigan,"¹⁹³ which it has distributed to local prosecuting attorneys. The manual is designed to aid local authorities in the procedural and substantive problems of consumer protection.¹⁹⁴ Also, the CPD has issued guidelines, such as "Guidelines for the Advertisement of Gasoline Prices by Retail Gasoline Dealers in Michigan,"¹⁹⁵ that give notice to businessmen that certain activities will be considered to be unfair and deceptive and that the division will take action to force their discontinuance. The attorney general's office has also issued advisory opinions that help to establish interpretations of consumer protection statutes pending further interpretations by the courts. For example, the office has issued an opinion that interprets Michigan's home solicitation sales act¹⁹⁶ in a manner that substantially broadens its scope.¹⁹⁷

vivencia del Consumidor de Michigan); "Seek Advice" (Consejo Busque); and "Take Time" (Tomese Su Tiempo). These pamphlets are distributed to libraries, schools, local community centers, and local consumer groups. Bladen Interview, *supra* note 154.

193. Office of the Michigan Attorney General, A Short Course on Consumer Protection Laws of Michigan (rev. ed. 1973).

194. This manual has proved useful to local prosecuting attorneys. Telephone Interview with John Knapp, Director, Washtenaw County Consumer Action Center, Washtenaw County Prosecuting Attorney's Office, Ann Arbor, Michigan, March 11, 1974; Telephone Interview with Paul G. Miller, Chief, Consumer Protection Division, Genesee County Prosecuting Attorney's Office, Flint, Michigan, March 19, 1974.

195.

Guidelines for the Advertisement of Gasoline Prices by Retail Gasoline Dealers
in Michigan

Pursuant to Michigan's deceptive advertising act, MCLA 445.801 *et seq.*; MSA 19.853(1) *et seq.*, a retail gasoline dealer's advertisement will be cited as false, misleading and deceptive if:

- 1) The price indicated on the roadside sign is *not* the same price as the price indicated on the pump.
- 2) The decimal portion of the price, for example, the .9 in a 34.9 cent price, is *not* "at least one-half the height and width of the numerals representing the whole cents." MSA 12.1081(28b).
- 3) The prices of all grades of gasoline sold at the station are *not* advertised, or alternatively, if the price of only one or two grades are advertised, the fact that one grade is a sub-regular grade is *not* clearly and conspicuously shown.
- 4) The station advertises a "no stamp price" or "minimum service island" and the conditions for the special price (such as a certain island or pump) are not clear and conspicuous.

Clear and conspicuous, as stated above, shall mean lettering which is easily readable by a driver from his vehicle, given the speed limits, the number of lanes on the road, the relative congestion in the area, and the position of the station with respect to the roadway.

During 1973, approximately 23 cease-and-desist orders were issued for violations of these guidelines. All but one of the respondents agreed to halt their deceptive advertising. That one is now being prosecuted. Bladen Telephone Interview, *supra* note 156.

196. MICH. COMP. LAWS ANN. §§ 445.111-.117 (Supp. 1973).

197. Letter Opinion from Frank J. Kelley, Michigan Attorney General, to Senator Jack Faxon, Dec. 7, 1972. The opinion held, *inter alia*, that the three-day cancellation provisions of the Act apply to situations in which a seller initiates contact with a buyer by telephone or a buyer-consumer initiates contact with a seller and then

B. Environmental Protection Activities

Most of the attorney general's activities in the environmental area are centered in the Environmental Protection and Natural Resources Division (EPNRD), which has substantial statutory powers.¹⁹⁸ These powers, along with the attorney general's common law powers, provide the basic framework for an effective environmental protection program. Again, the existence of adequate legal authority in the attorney general's office is of less value when the office lacks the resources needed to utilize that authority.¹⁹⁹ As in the consumer area, the attorney general's office suffers from a lack of resources, but it still is providing a substantial amount of protection for the environment.²⁰⁰

The EPNRD's broadest power to protect the environment is derived from the Environmental Protection Act.²⁰¹ An example of the division's recent activity under the Act is *Kelley v. National Gypsum Company*.²⁰² The Air Pollution Control Commission issued an order setting forth a schedule for the reduction of particulate emissions from the kilns at defendant's cement factory.²⁰³ The order

enters into a contract with that seller in the buyer's home. *Id.* at 3-6. This interpretation of the Act has been incorporated into the literature that is distributed by the division to the public. Bladen Telephone Interview, *supra* note 156.

198. See text accompanying notes 93-145 *supra*.

199. An example of the inability of the EPNRD to cope with a substantial portion of the state's environmental problems can be seen in the area of oil spills. There were approximately 186 oil spills affecting water in Michigan last year. Michigan Department of Natural Resources, Bureau of Water Management, Oil and Hazardous Materials Control Section, Report to the Water Resources Commission on Oil Loss Control Activities (1973). The attorney general's office, through the EPNRD, was able to take action on only two of these spills. The reason for its inability to deal with more of these spills is basically that the EPNRD was unable to obtain the evidence (such as samples and photographs) needed to bring either civil or criminal actions. Interview with Stewart H. Freeman, Assistant Attorney General, Environmental Protection and Natural Resources Division, Michigan Attorney General's Office, Lansing, Michigan, Feb. 8, 1974. If the EPNRD had a sufficient number of investigators to gather the evidence, legal action could be taken to force compliance with strict precautionary standards.

200. During the year 1973, the EPNRD received a total of 54 complaints from nonagency sources. There were 46 complaints from individual citizens, 5 from environmental groups, and 3 from local government authorities. Action was taken on all of the complaints. The average time required to take initial action on the individual citizen complaints was 11.4 days. A complaint sent in anonymously by the *Michigan Law Review* received initial action in 9 days and was properly investigated. In addition, the EPNRD carried over approximately 50 active cases from 1972, while it initiated 17 new cases in 1973.

201. MICH. COMP. LAWS ANN. §§ 691.1201-1207 (Supp. 1973). A study by Professor Joseph Sax of The University of Michigan shows that, through October 1, 1973, the attorney general has been involved in nine cases on his own initiative under the Environmental Protection Act. Sax & DiMento, *supra* note 101, manuscript at A-88 (appendix C).

202. No. 1918 (Alpena County, Mich., Cir. Ct., Sept. 25, 1973).

203. *In re National Gypsum Co.* (Air Pollution Control Commn., Feb. 16, 1971).

contemplated compliance by April 1977. By late 1972, the Commission staff was convinced that, while the defendant company had met the order's initial requirements, it would not meet its June 1974 obligation. The case was then forwarded to the EPNRD. Since the Commission's order had not yet been violated, the EPNRD filed a complaint alleging violation of the Environmental Protection Act and, in the alternative, a public nuisance. Because "both parties hereto believe[d] the interest of the public [could] best be served by a settlement of this litigation without further proceedings,"²⁰⁴ they agreed to enter into a consent judgment. The defendant agreed to comply with a graduated emissions reduction schedule, under which the Commission's standards would be met by December 1976, three months earlier than originally scheduled. The court has retained the case until compliance with the standards is achieved. The division attained more than the desired result of compliance with Commission standards without expending the resources that litigation would require.

The *National Gypsum* case is an example of the EPNRD's use of the common law power to abate public nuisances. The division's alternative ground for relief was that the air pollution emanating from the defendant's plant was of "such a density that it unreasonably interfere[d] with the public health and welfare so as to be a public nuisance."²⁰⁵

The EPNRD has also brought actions to recover for damages to the state's environment and natural resources. For example, in *People ex rel. Kelley v. Amoco Production Co.*,²⁰⁶ it brought an action alleging negligence by the defendants in the drilling of oil and gas wells in Grand Traverse county near Williamsburg, Michigan. In April 1973, gas blew out of one of the defendants' wells into subsurface permeable geological formations and created a "subsurface blow-out well." This gas eventually rose to the surface, where it escaped into several streams in the area, damaging the state's natural resources. The damage alleged included a reduction in the fish population of the streams, pollution of the waters of the streams, and pollution of the beds of the streams.²⁰⁷ This type of effort to recover for damages to the state's resources should be part of every action brought to prevent pollution.²⁰⁸

204. No. 1918, stipulation at 2.

205. No. 1918, complaint at 4.

206. No. 3461 (Grand Traverse County, Mich., Cir. Ct., filed Aug. 17, 1973). This case has been removed by the defendants to the United States District Court for the Western District of Michigan, No. G-217-73CA7, removed Sept. 10, 1973.

207. No. 3461, complaint at 5-6. The attorney general also sought recovery for damages to state highways and for the costs incurred by the various state agencies and departments during the emergency period. No. 3461, complaint at 4-5.

208. The attorney general can also bring the action under his common law power

The EPNRD has also intervened in two major pollution cases involving the Great Lakes²⁰⁹ and has filed several amicus curiae briefs in litigation outside of the state in order to support positions that would benefit Michigan's environmental program. One of the more important cases is *Minnesota v. United States Environmental Protection Agency*,²¹⁰ which involves the issue of whether the federal executive branch may refuse to spend eleven billion dollars for waste treatment facilities despite a Congressional intent to authorize the expenditure and despite environmental necessity. Minnesota brought the action to force the Environmental Protection Agency to spend the allocated funds, and a district court ordered the expenditure. The EPNRD filed an amicus curiae brief in support of affirmance by the United States Court of Appeals for the Eighth Circuit in the agency's appeal from the district court decision.²¹¹

The attorney general's office has also become involved in environmental issues raised before the Public Service Commission. By intervening in hearings, the attorney general is at present attempting to force the Commission to recognize that the Environmental Protec-

to recover for damage to the lands or property of the state or under the provisions of the Water Resources Commission Act or the Air Pollution Act if the pollution involves the violation of one of those two Acts. See text accompanying notes 140-41 *supra*. The attorney general would then be fulfilling both the goal of cessation of the pollution and that of restitution to the state.

209. *United States v. Reserve Mining Co.*, No. 5-72 Civ. 19 (D. Minn., Complaint of the State of Michigan, Intervening Plaintiff, filed March 10, 1972), where the plaintiffs are seeking to enjoin the defendant's pollution of Lake Superior by the discharge of solid and liquid industrial wastes from its iron ore processing plant in Minnesota.

The plaintiffs and the intervening Michigan Attorney General appear to have been successful in securing the abatement of the pollution. United States District Judge Miles Lord told the parties to the action that he will order the defendant to halt its discharges of taconite wastes containing dangerous asbestos fibers. The judge is now considering when to order the cut-off. *Detroit Free Press*, Feb. 27, 1974, at 1-A, col. 2 (metro ed.). In *People ex rel. Scott v. City of Milwaukee*, No. 72C-1253 (N.D. Ill.) (Motion of the State of Michigan for leave to intervene as a party plaintiff, filed June 29, 1972), the attorney general intervened, after remand from the United States Supreme Court, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), in an action to enjoin the defendant's pollution of Lake Michigan.

210. No. 73-1446 (8th Cir., docketed July 12, 1973).

211. No. 73-1446 (Brief of the State of Michigan as Amicus Curiae in Support of Affirmance, filed Sept. 14, 1973). This amicus curiae brief was adopted by the states of Arkansas, Illinois, North Dakota, and Wisconsin, pursuant to rule 29 of the Federal Rules of Appellate Procedure.

EPNRD has recently filed another amicus curiae brief with the United States Supreme Court seeking reversal of the Colorado court of appeals decision in *Western Alfalfa Corp. v. Air Pollution Variance Bd.*, 510 P.2d 907 (1973), which held that the state's pollution control agencies must secure a search warrant before entering a business premise to investigate possible violation of pollution control laws. *Western Alfalfa Corp. v. Air Pollution Variance Bd.*, No. 73-690 (Amicus Curiae in Support of Petition for Writ of Certiorari). The writ of certiorari was granted. 42 U.S.L.W. 3422 (U.S., Jan. 21, 1974).

tion Act imposes upon it a duty to consider environmental factors.²¹² In *In re Michigan Consolidated Gas Co.*,²¹³ the company petitioned the Commission for authorization to establish a priority system for the rationing of natural gas. Its proposed scheme placed the use of natural gas for the control of air pollution among the lowest priorities. The attorney general intervened, urging that the use of gas for pollution control be given a higher priority.²¹⁴ In opposition to the Commission's position that it had the authority to consider environmental issues but was not required to do so, the attorney general maintained that the Environmental Protection Act imposed a duty on the Commission to consider environmental issues.²¹⁵ The Commission did not explicitly resolve this issue, but it did assign pollution control a higher priority in the proposed scheme. Subsequent cases before the Commission indicate that it has begun to consider environmental issues in making other decisions.²¹⁶ The Commission has since asked the legislature for the authority to order public hearings on the environmental effects of proposed electric power lines²¹⁷ and has requested a formal opinion by the attorney general as to whether it already has the authority to order such a hearing.²¹⁸ The

212. The sources of that duty are the Michigan constitution, MICH. CONST. art 4, § 52, and sections 4 and 5 of the Environmental Protection Act. MICH. COMP. LAWS ANN. §§ 691.1204-1205 (Supp. 1973). The constitutional provision places an obligation on the legislature, and derivatively on the commissions created by the legislature, to protect the environment. The Environmental Protection Act lends support to the argument that the commission has such a duty; section 4(2), MICH. COMP. LAWS ANN. § 691.1204(2) (Supp. 1973), grants the courts the authority to remit any action to an available administrative agency to determine the legality of the defendant's conduct. The court is to retain jurisdiction of the case "pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded." By requiring the courts to ensure that the administrative agencies have properly considered environmental issues, the legislature has implicitly recognized an administrative duty to consider environmental factors. In section 5(2) of the Act, MICH. COMP. LAWS ANN. § 691.1205(2) (Supp. 1973), the administrative duty is made more explicit. The agency "shall" determine whether the alleged pollution is occurring and "shall" not authorize or approve any conduct which injures the environment so long as there is a feasible and prudent alternative.

213. No. U-3802 (Mich. Pub. Serv. Commn., June 1, 1971).

214. No. U-3802 (Notice of Intervention of Frank J. Kelley, Attorney General, filed Jan. 11, 1971). The attorney general based his intervention on section 5 of the Environmental Protection Act. MICH. COMP. LAWS ANN. § 691.1205(1) (Supp. 1973). The Public Service Commission refused to recognize that the attorney general could intervene as a matter of right but did allow the intervention. No. U-3802, transcript at 16-29.

215. No. U-3802, transcript at 992.

216. See *Michigan Consol. Gas Co., No. U-3933, & Consumers Power Co., No. U-3935* (Mich. Pub. Serv. Commn., Oct. 22, 1971) (Pipeline Construction Order), where the Commission, upon the attorney general's intervention, considered environmental factors in determining that the duplication of utility pipelines was unnecessary and reached a mutually acceptable compromise providing for consolidated pipelines that would reduce the threat of harm to the environment.

217. *Detroit Free Press*, Jan. 21, 1972, at 3-A, col. 7 (metro ed.).

218. *Id.* See text accompanying notes 282-83 *infra*.

attorney general's initiative in this area is an excellent example of how he is using his power to intervene to influence the environmental policies of the state.

As in the case of consumer protection statutes, the attorney general's office has issued advisory opinions interpreting pollution control statutes. For example, in 1970 he issued an opinion that held that the existing authority of local government units to adopt air pollution control ordinances was not pre-empted by the Air Pollution Act.²¹⁹ The attorney general's office has also expressed its opinion on environmental issues through other means. For instance, it offered a position paper in a hearing before the Department of State Highways concerning the ecological advantages of creating a bicycle transportation network in Michigan.²²⁰ The attorney general has also presented a position paper before the Federal Trade Commission in support of proposed regulations requiring the disclosure in advertisements of the phosphorus content of cleaning agents.²²¹ He has presented a position paper in support of proposed federal railroad and motor carrier noise emission standards before the federal Environmental Protection Agency.²²² The purpose of these nonlitigation activities is to establish a solid statutory framework within which the office can provide for effective environmental protection. To the extent that environmental problems are solved by legislation, the workload of the attorney general's office and, consequently, the problem of insufficient funds are somewhat reduced.²²³

III. PROPOSALS FOR A MORE EFFECTIVE ROLE

The most efficient use of the attorney general's limited resources can be achieved if the state's public interest activities are centralized in his office. Because of his broad powers to enforce the laws and to influence the approval of new laws and the formulation of state policy, his office should coordinate activities in the protection of the public interest on a statewide basis. The National Association of Attorneys General (NAAG) recommends that each state's attorney general be given the primary responsibility for enforcing consumer

219. [1969-70] MICH. ATTY. GEN. BIENNIAL REP. 197.

220. Position Paper of the Attorney General of Michigan, *The Development of a Bicycle Transportation Network in Michigan*, March 27, 1973.

221. Position Paper in Support of the Proposed Regulation submitted by the Attorney General of Michigan, *The Proposed Regulation Concerning Detergent Labeling and Advertising*, Jan. 2, 1973.

222. Position Paper in Support of Noise Pollution Abatement submitted by the Attorney General of Michigan, *Railroad Noise Emission Standards and Motor Carrier Noise Emission Standards*, March 20, 1973 (Environmental Protection Agency Docket Nos. ONAC 7201001 and ONAC 7202002).

223. Compare the situation in the consumer protection field discussed in the text accompanying notes 298-99 *infra*.

protection laws and for representing the public interest before state regulatory boards and that the attorney general be empowered to file any action he deems necessary to protect the public interest.²²⁴ The trend in most states is toward a centralized structure in the attorney general's office to deal with these problems.²²⁵ The attitudes of current and former state attorneys general indicate that a majority of them feel that their states' consumer protection activities should be primarily under the attorney general's jurisdiction,²²⁶ and in the recent past, most states, including Michigan, have created state consumer protection and environmental protection sections within the attorney general's office.²²⁷ Of particular interest is the response of the Michigan attorney general to an NAAG questionnaire concerning the centralization issue:

The Attorney General is the only state officer with the necessary authority to rapidly and effectively deal with consumer fraud problems. Only the Attorney General, as this state's chief law enforcement officer, presents an imminent threat of litigation to those who choose to engage in deceptive and fraudulent practices. Since an effective consumer protection program requires constant legal analysis of various problems and legal decisions regarding possible litigation, said program should clearly be under the direction of the state's chief law enforcement officer.²²⁸

Even though Michigan has a structure conducive to centralized activity, the actual responsibility is shared between local prosecutors' offices and the attorney general's office.²²⁹ In addition, there is no centralized reporting system.²³⁰ Centralization would facilitate a coordinated attack on the state's problems and encourage the application of the attorney general's expertise, resources, political power,

224. OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 8-9.

225. For a compilation of state attorneys general with assistants regularly assigned to consumer protection activities, see OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 417. For a compilation of offices with assistants assigned to environmental activities, see Environmental Control Questionnaires, *supra* note 148, at 3. See also Lovett, *supra* note 55, at 735.

226. OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 395. The questionnaire revealed that 31 out of 38 current (1970) attorneys general and 69 out of 108 former attorneys general felt that consumer protection activities should be centered in the attorney general's office. But see OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 29, where those same current (23 out of 38) and former (46 out of 70) attorneys general felt that their most important function was to represent the state's agencies, a function that could be inconsistent with representing the public.

227. ENVIRONMENTAL CONTROL QUESTIONNAIRES, *supra* note 148, at 3; OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 416. Michigan's consumer protection division was established in 1960, while its environmental protection division was established in 1972. Styka Interview, *supra* note 19.

228. OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 415.

229. Styka Interview, *supra* note 19.

230. See text accompanying notes 244-48 *infra*.

and authority. The need for centralized activity is accentuated by the difficulties involved in private efforts to provide protection,²³¹ the limitations on local authorities due to inadequate resources and their need to concentrate on crimes involving physical violence,²³² and the apparent ineffectiveness of regulatory action by the state's administrative agencies.²³³ In addition, a centralized system will allow the state's environmental and consumer laws to be consistently applied; a program that does not give notice to persons contemplating illegal activity that the state has a clear intent to pursue violators of the law can never provide adequate protection for the public. A decentralized program dissipates already limited resources, making coordination difficult, if not impossible, and inhibiting citizen access to the authorities empowered to deal with violations because of the

231. Some of the difficulties involved in private litigation include the plaintiff's difficulty in proving that he has standing, whether individually or as a member of a plaintiff class; the high costs and expenses involved in private actions in these areas; and the fact that, when "an individual does decide to exert a legal claim to environmental quality, he may find that he has taken on the legal and economic resources of an entire industry." Jackson, *Symposium: Control of Environmental Hazards—Foreword: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073, 1076 (1970). See generally Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Juergensmeyer, *Control of Air Pollution Through Assertion of Private Rights*, 1967 DUKE L.J. 1126; Comment, *Standing To Sue and Conservation Values*, 38 COLO. L. REV. 391 (1966); Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 712-16 (1967); Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254, 1275-78 (1970); Note, *Citizen Remedies in State Courts*, 25 RES IPSA LOQUITUR 52 (1972). But see Mussehl, *The Neighborhood Consumer Center: Relief for the Consumer at Grass Roots Level*, 47 NOTRE DAME LAW. 1093, 1132 (1972) (private remedies should be favored since "no effective restitution remedy exists within the sphere of governmental interests."); Startts, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U. L. REV. 407, 479-80 (1969) (despite the traditional restrictive view of standing in class actions, Michigan courts may be in the midst of a liberalizing trend). See, e.g., Paley v. Coca Cola Co., 39 Mich. App. 379, 197 N.W.2d 478 (1972), where the court of appeals declined to follow a recent federal case, *Snyder v. Harris*, 394 U.S. 332 (1969), and held that the plaintiffs could aggregate their individual damage claims in order to meet minimal jurisdiction amount requirements if the action could not otherwise be maintained in the circuit court.

232. W. MAGNUSON & J. CARPER, *supra* note 1, at 29-30; Saxbe, *supra* note 3, at 904. See also Detroit Free Press, Oct. 21, 1973, at 3-A, col. 5 (metro ed.), where it is reported that the Wayne County prosecutor's office has received 928 complaints of consumer fraud but had started only six prosecutions. The reasons given for this inactivity include lack of resources, unfamiliarity with consumer laws, and fear of local merchants who might help defeat the local prosecutor at election time. The article also notes that consumer activities in outstate counties' prosecutors' offices are almost nonexistent. Local activity for the protection of the consumer does not seem to be likely in the near future. In fact, the Wayne County Prosecutor's Office recently lost federal funds to operate its consumer fraud unit. The prosecutor failed to submit a plan that met the federal requirements for such programs. Specifically, he lost the 84,000-dollar grant because he had made no plans for the mediation of complaints and because his consumer education program was inadequate. Detroit Free Press, Dec. 4, 1973, at 3-A, col. 1 (metro ed.).

233. See Detroit Free Press, Oct. 1, 1973, at 3-A, col. 2 (metro ed.) (discussing the ineffectiveness of the Michigan Consumers Council in its activities to protect the consumer); Comment, 68 MICH. L. REV. 1254, *supra* note 231, at 1259.

confusing array of agencies.²³⁴ If public interest problems, especially in the consumer area, are dealt with only at the local level, the violators may simply move to another part of the state and continue their activities.²³⁵ Action by the attorney general would prevent the continuation of the activities anywhere within the state. Finally, centralization allows for easy compilation of reported violations and complaints. This compilation may enable the attorney general to recognize those problems that are of major concern and to warn the public of the violators' activities.²³⁶

The attorney general also enjoys certain procedural advantages over both the private citizen and the local prosecutor. First, he has no problem in establishing his standing to sue since he is authorized to sue by statute if the public interest is involved.²³⁷ The local prosecutor, in contrast, is limited to attacking problems that involve the interests of those citizens within his jurisdiction, not those that involve the interests of the citizens of the state as a whole. Second, the attorney general can utilize special venue statutes,²³⁸ which allow him to force the defendant to litigate at the state capital, in order to persuade the violator to agree to a consent judgment or voluntary assurance of discontinuance.

A policy of centralization is not without its disadvantages. First, most of the factors discussed above are advantageous only to the extent that the problem under attack is statewide. A significant number of consumer and environmental problems are local in nature. If the attorney general had the sole responsibility to deal with local problems, many of the violations would, because of the need to allocate limited resources, go unattended. Often these smaller violations most affect the daily life of the public.

One resolution of the dilemma has been a system of concurrent activity, in which the attorney general and the local prosecutor divide the responsibility for public protection.²³⁹ The attorney general has the authority to deal with any problem that he deems of sufficient statewide interest. The local prosecutor has the authority

234. Comment, 68 MICH. L. REV. 926, *supra* note 1, at 931-32.

235. *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1124 (1967); Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 718 (1967).

236. Note, *supra* note 235, at 718.

237. MICH. COMP. LAWS ANN. §§ 14.23, .101 (1967). See *People v. O'Hara*, 278 Mich. 281, 294, 270 N.W. 298, 303 (1936); *Attorney General ex rel. Seitz v. Board of Auditors*, 73 Mich. 53, 54-55, 40 N.W. 852, 852 (1888); *Attorney General ex rel. Sheley v. City of Detroit*, 55 Mich. 181, 183, 20 N.W. 894, 895-96 (1884); *Attorney General ex rel. Cook v. City of Detroit*, 26 Mich. 263, 266-67 (1872); *Gremore v. Peoples Community Hosp. Authority*, 8 Mich. App. 56, 59, 153 N.W.2d 377, 378 (1967).

238. MICH. COMP. LAWS ANN. § 14.102 (1967); MICH. COMP. LAWS ANN. § 600.1631 (1968). See note 112 *supra*.

239. See Comment, *Translating Sympathy for Deceived Customers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 429-30 (1966).

to deal with all other problems within his jurisdiction. This concept is, to some degree, now contemplated by the Michigan statutes, which give the local prosecutor jurisdiction over his district or county while allowing the attorney general to initiate or intervene in any action.²⁴⁰

Second, if centralization is carried out to too great an extent, the role that each local community's values play in the establishment and application of the law would be destroyed.²⁴¹ The attorney general's implementation of an effective program of centralization should allow for locally variant values and conditions. The attorney general's office is trying to accommodate these considerations in the consumer protection area by encouraging the establishment of local consumer protection agencies and boards and by giving advice to local authorities on the prevention and effective prosecution of unfair consumer practices.²⁴²

Third, centralization could increase the attorney general's workload and decrease the substantive level of protection unless additional resources are made available to his office.²⁴³ Finally, the centralization of activity in Lansing might inhibit the ability to act quickly when necessary to preserve the assets of defrauded consumers from dissipation or to protect the public and the environment from the irreparable harm of continued pollution. While delay is probably inevitable in any centralized system, the attorney general can ameliorate the problem by deferring initially to the initiative of local prosecutors and then reviewing the reports from the prosecutors in order to select those cases in which he should participate.

Currently, the Consumer Protection Division participates in a policy coordination council with twelve of the largest counties in Michigan.²⁴⁴ At the meetings of this council, the attorney general's representatives and the local prosecuting attorneys discuss their various problems, and the CPD gives the local prosecutors guidance. In addition, the attorney general maintains a close working relationship with local prosecuting attorneys throughout the state and gives them as much help as possible.²⁴⁵ However, this is not the comprehensive coordination program that is needed.

240. MICH. COMP. LAWS ANN. §§ 14.28, .101 (1967).

241. Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1080 (1955), where the author comments that "[t]he desire of a particular community to enforce the laws according to its needs should be respected if this will not be inimical to the interests of the state."

242. Bladen Interview, *supra* note 154. But see Detroit Free Press, Oct. 21, 1973, at 3-A, col. 5 (metro ed.), pointing out the ineffectiveness of local consumer activities.

243. Comment, 68 MICH. L. REV. 926, *supra* note 1, at 971.

244. Telephone Interview with Edwin M. Bladen, Assistant Attorney General, Consumer Protection and Charitable Trusts Division, Michigan Attorney General's Office, Lansing, Michigan, March 26, 1974. This council is established as a part of the federal Law Enforcement Assistance Administration program.

245. *Id.*

For a year and a half the attorney general operated a computerized system of recording and categorizing complaints from all law enforcement agencies in Wayne county.²⁴⁶ This system provided the CPD with a rapid compilation of the activities within the county and allowed it to determine when action by the office was warranted.²⁴⁷ The program was discontinued when support from the federal government ended. The end of the system meant that the attorney general could no longer choose among the problems.

One limitation on any reporting system is that it aids in discovering problems only to the extent that local prosecutors discern the existence of those problems.²⁴⁸ Nonetheless, it is important that the state have the capability to become aware of and attack statewide problems. If sufficient resources could be found, a computerized compilation system should be established for both consumer and environmental problems.

Once the problems upon which the attorney general should concentrate have been defined, there are four major ways in which he should direct his activities in order to meet the twin goals of prevention and restitution. They are (1) litigation, (2) influencing state policy, (3) the promotion and support of better legislation, and (4) the promotion of educational programs designed to inform the public of its rights and of the channels available to seek redress of grievances.

Perhaps the major area of the attorney general's activity should be litigation. This need not always require formal court action. Effective results can often be obtained by means of a phone call or a letter to the violator suggesting that the attorney general has information concerning a possible violation and that his office would like to see the problem corrected. There will, of course, be cases where an informal approach is inappropriate, either because the attorney general wants to establish solid legal precedent or set an example for other potential violators, or because the violator refuses to comply.

When informal methods are unsuccessful and formal litigation is required, the attorney general must decide whether he should resort to a criminal action, a civil action, or some combination of the two. A criminal prosecution has several advantages. First, the threat of prosecution gives the lower-level manager—for example, a local plant manager or a local franchisee—a persuasive argument with

246. *Id.* The program was supported by assistance from the Federal Trade Commission in the form of computer time.

247. *Id.* For example, the CPD determined, as a result of over 100 complaints against Time Incorporated, that it should bring an action to force the discontinuance of fraudulent activities. See text accompanying notes 164-66 *supra*.

248. For a way in which this problem can be ameliorated to some extent, see notes 304-08 *infra* and accompanying text.

which to convince his superiors that the funds necessary for compliance with the law should be made available or that the illegal activities should be halted.²⁴⁹ Second, the threat of criminal prosecution, especially if that threat is made real by the periodic prosecution of major offenders, can be an effective deterrent.²⁵⁰

However, the *in terrorem* effects of criminal prosecutions may be difficult to achieve because of the problems involved in successfully prosecuting alleged violators. For example, in order to support a criminal conviction for unfair consumer practices under the false advertising statute²⁵¹ or the false pretenses statute,²⁵² the attorney general must prove beyond a reasonable doubt that the defendant intended to deceive or defraud the consumer,²⁵³ that the consumer relied on the defendant's statements,²⁵⁴ and, in the case of false pretenses, that the defendant had actual knowledge of the falsity of his statement and that the false pretense related to an existing fact and not to some future event.²⁵⁵ This heavy burden of proof makes the use of the criminal sanction both difficult and expensive.

Civil remedies have several advantages over criminal remedies. Procedurally, civil remedies are more easily obtained by the attorney general: The burden of proof required in a civil action is less than that required in a criminal action since the attorney general need not provide each element of the offense beyond a reasonable doubt; the pleadings in civil actions are usually simpler; and the scope of discovery is usually broader than it is in a criminal action. In a civil action, the attorney general can obtain a default judgment if

249. OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 388.

250. An *in terrorem* effect will result from the use of criminal prosecutions only if those who are prosecuted under the statutes are actually forced to serve jail sentences, for a fine will often be treated as a cost of business and passed on to the public. The attorney general, in order to ensure that the criminal statutes do retain their *in terrorem* value, must be willing to punish those violators who continually and willfully engage in improper activities. On the value of criminal prosecutions, see generally Kovel, *A Case for Civil Penalties: Air Pollution Control*, 46 J. URBAN L. 153 (1969); W. MAGNUSON & J. CARPER, *supra* note 1, at 16-17, 62; Saxbe, *supra* note 3, at 901-04; *Developments in the Law—Deceptive Advertising*, *supra* note 235, at 1018, 1122-23; Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALBANY L. REV. 61 (1972); Comment, *supra* note 239, at 424-27.

251. MICH. COMP. LAWS ANN. § 750.33 (1968).

252. MICH. COMP. LAWS ANN. § 750.218 (1968).

253. *People v. Austin*, 301 Mich. 456, 460, 3 N.W.2d 841, 842 (1942) (intent to deceive); *People v. Lee*, 259 Mich. 355, 356, 243 N.W. 227, 228 (1932) (intent to defraud).

254. *People v. Lee*, 259 Mich. 355, 356, 243 N.W. 227, 228 (1932).

255. *People v. Morrison*, 348 Mich. 88, 91, 81 N.W.2d 667, 668 (1957) (false pretense must relate to existing fact); *People v. Larco*, 331 Mich. 420, 429, 49 N.W.2d 358, 363 (1951) (actual knowledge of falsity by defendant). These strict requirements are still part of Michigan law. See *People v. Sharpe*, 22 Mich. App. 454, 178 N.W.2d 90 (1970). Another problem in false advertising cases is that the courts have held that not every misleading statement is actionable. The courts have made an allowance for the normal "puffing" of a product. See, e.g., *People v. Austin*, 301 Mich. 456, 460, 3 N.W.2d 841, 842 (1942) (dictum).

the defendant fails to appear, whereas he cannot try the defendant *in absentia* on a criminal charge. Finally, the attorney general is allowed to appeal from an adverse civil decision, while an appeal would not be allowed from an acquittal on a criminal charge.²⁵⁶

A practical advantage of the civil suit is that the possibility of a favorable jury decision may be greater. Juries are not anxious to impose the stigma of moral blame that accompanies criminal conviction on a polluter or a person engaged in unfair consumer practices.²⁵⁷

A final advantage to the civil approach is that restitutionary relief is more likely in such actions, for the attorney general can request a return to the *status quo ante* along with his request for injunctive relief. However, restitution could be made part of a criminal sentence. For example, a suspended sentence could be made conditional on restitutionary relief.

The problems inherent in the use of a criminal approach should not totally preclude its use. The attorney general should use a combination of civil and criminal actions,²⁵⁸ but, because of the procedural advantages and the possibility of restitution, the civil suit should be favored. Criminal actions should be brought only to the extent necessary to support and maintain whatever *in terrorem* effect they may provide and, if necessary, to punish willful and continued violations.

In addition to deciding how to proceed against an alleged violator, the attorney general must decide whether to go to court at all. There is no doubt that, like all prosecutorial officials, the attorney general has broad discretion to decide when and how to take action in the public interest.²⁵⁹ There are, however, some limits upon that discretion. He cannot base his decision upon an improper motive

256. Kovel, *supra* note 250, at 156-58.

257. *Id.* at 154-56. The author concludes that "[w]e may regret that the moral sense of the community is not sufficiently developed to consider pollution morally wrong, but until it is there is little sense" in pursuing criminal remedies. *Id.* at 155.

258. *Id.* at 170-71.

259. *Mundy v. McDonald*, 216 Mich. 444, 450, 185 N.W. 877, 880 (1921); *Attorney General ex rel. Linnell v. Gay*, 162 Mich. 612, 616, 127 N.W. 814, 816 (1910); *Ex rel. Coon v. Attorney General*, 42 Mich. 65, 3 N.W. 258 (1879); *People ex rel. Yates v. Attorney General*, 41 Mich. 728, 729, 3 N.W. 205, 206 (1879); *Gremore v. Peoples Community Hosp. Authority*, 8 Mich. App. 56, 59, 153 N.W.2d 377, 378 (1967). For general discussions of prosecutorial discretion, see F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1970); Dickens, *The Attorney-General's Consent to Prosecutions*, 35 MOD. L. REV. 347, 357 (1972) ("[a]n undoubted area of the Attorney-General's unreviewable discretion is in civil relator actions by which he may act at the relation of any person on behalf of the Crown as *parens patriae* to enforce the law for the general public benefit."); Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L.F. 88; Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174 (1965); Note, *Judicial Control of the Decision To Prosecute*, 24 FACULTY OF LAW REVIEW 133 (1966) (University of Toronto); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955).

such as discrimination on the basis of race or religion.²⁶⁰ In intervention situations, his discretion is limited by the parties' right to a prompt disposition of their controversy and the court's power to control the proceedings before it in an orderly fashion.²⁶¹ Beyond these minimal limitations, which only provide for the review of affirmative action undertaken by the attorney general and provide no method of reviewing an attorney general's decision not to take action, his discretion is unlimited. Mandamus will not lie, because his prosecutorial duty is not ministerial.²⁶² The courts have recited a general rule that the attorney general's discretion is subject to judicial review if it is "clearly inimical" to the public interest,²⁶³ but, as a practical matter, there is no real supervision. This will be important when no action is taken on a complaint brought by a citizen to the attorney general's office. Beyond political pressure, the decision not to act is not reviewable.²⁶⁴

The existence of this broad discretionary power presents the issue of whether effective protection of the public interest might not be better served if the attorney general were to establish a set of guidelines on when action should be taken. On the national level the American Bar Association has attempted to establish guidelines for criminal prosecutions, in order to facilitate and, to some extent, control prosecutorial discretion.²⁶⁵ The Michigan attorney general

260. *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 588-89 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Steele*, 461 F.2d 1149, 1151 (9th Cir. 1972); *People v. Gray*, 254 Cal. App. 2d 256, 263-64, 63 Cal. Rptr. 211, 215-16 (1967). See also *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973), where the court said that discriminatory prosecution "on the basis of the exercise of protected First Amendment activities" is forbidden "just as discrimination on the basis of religion or race is forbidden by the Constitution."

261. *Gremore v. Peoples Community Hosp. Authority*, 8 Mich. App. 56, 59, 153 N.W.2d 377, 378 (1967). On the issue of the court's power to control the proceedings before it, see *Hain v. Newell*, 223 Mich. 20, 27-28, 193 N.W. 839, 842 (1923): "All courts of general jurisdiction have inherent power to make and protect relevant interlocutory orders and to do all incidental things which seem reasonably necessary for the administration of justice and efficient exercise of their functions within the scope of their jurisdiction."

262. See notes 91-92 *supra* and accompanying text.

263. *People v. Johnston*, 326 Mich. 213, 217, 40 N.W.2d 124, 126 (1949).

264. *Attorney General ex rel. Linnell v. Gay*, 162 Mich. 612, 616, 127 N.W. 814, 816 (1910): "We do not mean to imply that there is any obligation upon the attorney general under this action to file an information when, in his judgment, there are proper reasons of policy for not doing it, or any obstacle to a refusal to do so when solicited by private persons in the furtherance of their own interests, provided State interests do not require it." But see *Lamoreaux v. Attorney General*, 89 Mich. 146, 150-51, 50 N.W. 812, 813 (1891), where the court said that it would review the refusal of the attorney general to institute a *quo warranto* action against a city sheriff because it feared that, where the attorney general and the sheriff were of the same political party, the attorney general's refusal may be based on improper motives.

265. See, e.g., ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION standards 3.8-3.9 (1971) [hereinafter ABA STANDARDS]. The ABA also recommends that each "prosecutor's office should

has no such formal guidelines in the consumer and environmental areas.²⁶⁶ Guidelines would assure that resources were directed toward the problems that most need attention. A set of guidelines, however, can be no more than just that. The facts of each situation vary to such an extent that any set of guidelines should allow for flexibility of action; their ultimate value lies in their use as recommendations.

Several basic factors should go into any decision of when to take action. The attorney general must first decide if the violation is of such a nature as to warrant action by any prosecutorial officer and then decide if the violation warrants action by his office in particular. Recommended considerations include the nature, extent, and scope of the harm caused, the financial situation of the affected citizen, the possibility of successful litigation, speed of disposition, the degree of willfulness involved, the importance of the case in the attorney general's general scheme to provide statewide consumer or environmental protection, and the relative importance of a successful resolution of this particular case in comparison to the actions that will not be handled if resources are allocated to it. The attorney general should give no weight to personal or political advantages that might be involved in a particular case,²⁶⁷ but it is inevitable that such considerations will occasionally be a factor.²⁶⁸ To the extent that a decision is immune from such considerations, however, the establishment of guidelines will help the office fulfill its obligation to protect the public interest.

In addition to the lack of prelitigation guidelines, the Michigan attorney general has no system of periodic checks to determine whether the requirements of voluntary agreements or judicial judgments are being complied with.²⁶⁹ Particularly when voluntary

develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office." *Id.*, standard 2.5. Cf. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, MODEL MANUAL OF POLICIES AND PROCEDURES FOR ATTORNEYS GENERALS' OFFICES (1972). Twelve states' attorney general's offices have or are preparing procedures manuals in the area of consumer protection. State Programs, *supra* note 148, at 32-33.

266. Telephone interview with Ronald J. Styka, Assistant Deputy Attorney General, Michigan Attorney General's Office, Lansing, Michigan, March 12, 1974.

267. See ABA STANDARDS, *supra* note 265, standard 3.9(c).

268. See *Developments in the Law—Deceptive Advertising*, *supra* note 235, at 1133 ("[T]he strong political aura which inevitably surrounds an elected attorney general encourages an overemphasis on consumer refunds and may occasionally discourage action against the questionable practices of 'respectable' businessmen."); Comment, *Public and Private Consumer Remedies in New York*, 34 ALBANY L. REV. 326, 329 (1970). However, "[p]olitical sensitivity can work both ways . . . and the consumer's complaint might have some publicity value." Mussehl, *supra* note 231, at 1132. See also Comment, 70 MICH. L. REV. 1367, *supra* note 1, at 1374 n.44.

269. Bladen Telephone Interview, *supra* note 156; Telephone Interview with Stewart H. Freeman, Assistant Attorney General, Environmental Protection and Natural Re-

methods are used, the attorney general must carefully check for compliance. Without such a system, the tool of voluntary agreement is ineffective. There is no such system because there are not enough resources to provide for even the initial enforcement of the law, much less for follow-up enforcement.²⁷⁰ In the environmental area, part of the responsibility for such a program can be placed on the administrative agencies, but the EPNRD must persuade the agencies to allocate a sufficient amount of their resources to fund the compliance program. Whether by securing more funds from the legislature or by convincing the agencies to establish compliance programs, the attorney general must ensure that an effective system is established.

The second method used by the attorney general should be the exercise of influence on the formulation of state policy. The recognition that the attorney general is more than just the governor's attorney suggests that he should have, and does have, a role to play in state policy formulation.²⁷¹ Because there may be doubt under some of the statutes establishing administrative agencies as to whether the attorney general must wait for agency referral before he can act, he must ensure that the state's policies are such that he need not always exercise initiative power. There are several ways in which the attorney general can seek to establish administrative policies that, in themselves, properly protect the public interest.

First, he can influence the policies of state agencies by issuing advisory opinions.²⁷² The attorney general currently issues three types of advisory opinions: informal opinions to agency and department heads, letter opinions, and formal opinions.²⁷³ While many

sources Division, Michigan Attorney General's Office, Lansing, Michigan, March 13, 1974 [hereinafter Freeman Telephone Interview].

270. *Id.*

271. See B. ABERNETHY, SOME PERSISTING QUESTIONS CONCERNING THE CONSTITUTIONAL STATE EXECUTIVE 38 (1960), where the author, in commenting upon the results of a questionnaire sent to governors and attorneys general concerning the position of the attorney general in state government, concludes that

[a] thin and not too easily defined thread of thought runs through all their comments, which seems to say that this is not solely a ministerial post; that its responsibilities go beyond and embrace something of the judicial and perhaps even of the representative; that the attorney general is not solely the governor's attorney, or even solely his administration's attorney, but is rather the people's and the state's attorney, responsible to maintain and protect the interests and rights of the people and of the state as against the governor and his administration, as well as to serve state officials . . . and that here is an institution about which hangs an aura of the ancient and of the common law, as well as constitutional statutory law, which marks it for special status and stature in the state governmental structure.

But cf. note 226 *supra*.

272. MICH. COMP. LAWS ANN. § 14.32 (1967). See generally Larson, *The Importance and Value of Attorney General Opinions*, 41 IOWA L. REV. 351 (1956); Scott, *The Role of the Attorney General's Opinions in Illinois*, 67 NW. U. L. REV. 643 (1972); Toepfer, *Some Legal Aspects of the Duty of the Attorney General To Advise*, 19 U. CIN. L. REV. 201 (1950).

273. Styka Interview, *supra* note 19.

jurisdictions hold that formal opinions are not binding on state agencies,²⁷⁴ in Michigan formal advisory opinions, while not binding on the courts,²⁷⁵ do bind state agencies.²⁷⁶

Even if the Michigan courts were to hold that no opinions are binding on state agencies, an opinion by the attorney general would, in all probability, still be followed.²⁷⁷ The agency's desire to do what the law requires motivates its request for the opinion, and a well-reasoned and well-researched opinion will most likely be followed.²⁷⁸ Also, the agencies wish to be protected by the attorney general's opinion. While this protection is debatable from a legal point of view,²⁷⁹ action supported by an opinion will at least be likely to protect the agency from public criticism. Moreover, the agency will probably follow the opinion simply because it is the agency's only source of legal advice. Finally, state officials may follow the attorney general's opinion because they feel that the state courts will consider the opinion to be highly persuasive authority.²⁸⁰ The Michigan attorney general's issuance of advisory opinions has been limited in the recent past, but efforts are currently being made to increase activity in this respect.²⁸¹

The present system has one major defect. The time delay between the request for an opinion and its issuance is, in some cases, unreasonably long. For example, in 1972, the Michigan Public Service Commission requested an opinion as to whether it had the authority to order public hearings on the environmental effects of proposed electric power lines.²⁸² The opinion has not yet been is-

274. Christenson, *supra* note 3, at 326; Larson, *supra* note 272, at 360-61.

275. *Fowler v. Kavanagh*, 63 F. Supp. 167, 168-69 (E.D. Mich. 1944), *revd. on other grounds*, 146 F.2d 961 (6th Cir. 1945); *David Walcott Kendall Memorial School v. City of Grand Rapids*, 11 Mich. App. 231, 237, 160 N.W.2d 778, 781 (1968).

276. *Traverse City School Dist. v. Attorney General*, 384 Mich. 390, 410 n.2, 185 N.W.2d 9, 17 n.2 (1971). See also [1950-1952] MICH. ATTY. GEN. BIENNIAL REP. 54, 55.

277. Abraham & Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 799-800 (1969); Christenson, *supra* note 3, at 326-27; Larson, *supra* note 272, at 361; Scott, *supra* note 272, at 653.

278. Christenson, *supra* note 3, at 326.

279. Christenson, *supra* note 3, at 327; Larson, *supra* note 272, at 363; Toepfer, *supra* note 272, at 216-17. If a state official follows an attorney general's opinion, he will most likely have a good faith defense to any action brought against him. See *State ex rel. Smith v. Leonard*, 192 Ark. 834, 839-40, 95 S.W.2d 86, 88-89 (1936); *State ex rel. Johnson v. Baker*, 74 N.D. 244, 277, 21 N.W.2d 355, 372 (1945).

280. *David Walcott Kendall Memorial School v. City of Grand Rapids*, 11 Mich. App. 231, 237, 160 N.W.2d 778, 781 (1968). See also *Fowler v. Kavanagh*, 63 F. Supp. 167, 168-69 (E.D. Mich. 1944), *revd. on other grounds*, 146 F.2d 961 (6th Cir. 1945).

281. Styka Interview, *supra* note 19. For example, in 1973, the Assistant Attorney General in charge of the EPNRD estimated that his division issued 6 formal opinions and 160 letter opinions. During a one-week sample period, his division handled 96 informal opinions. Freeman Telephone Interview, *supra* note 269.

282. *Detroit Free Press*, Jan. 21, 1972, at 3-A, col. 7 (metro ed.). See text accompanying note 218 *supra*.

sued. The opinion request received a quick response at the division level, but its controversial nature led to its delay by the five-man board that reviews all proposed formal opinions.²⁸³ While the attorney general must ensure that each formal opinion is correct with respect to both law and policy, some care must also be taken to ensure that the process of review does not destroy whatever value a proper opinion may have. The attorney general should see that opinion requests proceed expeditiously through his office and that the opinions are issued while they will still be of use to the agency that requested them. The establishment of formal time limits on each step of the issuing process might be helpful.

A program of advisory opinions aimed at ensuring that the policies of the state's administrative agencies are consonant with the protection of the public interest might be challenged on the ground that it constitutes unwarranted interference with the agencies' legislative mandate to deal with consumer and environmental problems. While excessive use of opinions might be justifiably criticized on this ground, the reasonable exercise of the opinion power can withstand such a challenge. The attorney general has also been given a legislative mandate to provide for consumer and environmental protection. It is within his authority to use all his powers to see that such protection is provided.

There is one limiting factor on the opinion power of the attorney general. He may issue an advisory opinion only upon a request from the governor, the legislature, or any state officer.²⁸⁴ While this statutory requirement may theoretically limit his power, the prospects of securing a request for an opinion on a particular issue are probably good.²⁸⁵ If the attorney general can secure the necessary request, his advisory opinion power is an effective way through which to influence and help formulate state policy.

A second method that the attorney general can employ to influence state policy at the administrative level is given to him by the Michigan Administrative Procedures Act.²⁸⁶ Section 45²⁸⁷ of the Act provides that the approval and adoption of any agency rule or standard is conditioned upon the attorney general's determination that it is legal. His determination under this section need not stop at the point where he decides that the proposed regulations are not unconstitutional or in conflict with a statute, as it presently does.²⁸⁸

283. Interview with Roderick S. Coy, Assistant Attorney General, Special Litigation Division, Michigan Attorney General's Office, Lansing, Michigan, Feb. 8, 1974.

284. MICH. COMP. LAWS ANN. § 14.32 (1967).

285. Freeman Telephone Interview, *supra* note 269.

286. MICH. COMP. LAWS ANN. §§ 24.201-.315 (Supp. 1973).

287. MICH. COMP. LAWS ANN. § 24.245(1) (Supp. 1973).

288. Freeman Telephone Interview, *supra* note 269. In some instances, it may be impractical for the attorney general's office to give substantive review to policy consid-

The attorney general has the right to require that the proposed regulations be in accordance with the legislature's desire to provide for consumer and environmental protection. The effectiveness of this power, however, is dependent on the initial adoption of rules by the agencies since the attorney general can only comment on proposed regulations.

If the attempts of the attorney general to influence state policies by using advisory opinions or through the review of proposed regulations do not succeed, he can still influence agency policies by refusing to represent the agencies in particular litigation, because he is their exclusive legal representative.²⁸⁹ While the office has not done this recently,²⁹⁰ it could in the future refuse to initiate an action requested by the agency or refuse to defend the agency in an action brought against it.

This approach can be criticized as a violation of the duty, imposed upon the attorney general by the legislature, to represent state agencies.²⁹¹ It can be argued that, if the attorney general is to maintain the position that he has the exclusive power to represent state agencies, he must provide that representation at all times. The legislature may not have intended to give the attorney general such power over state agencies. He has, however, been given clear instructions to protect the public interest in consumer and environmental areas. It can be inferred from this that he should utilize all powers available to protect the public interest and that one of these powers is to decide whether his representation of an agency would be detrimental to the public interest. There is some support for this principle at the federal level.²⁹² In addition, the American Bar Association Code of Professional Responsibility provides that an attorney may "exercise his professional judgment to waive or fail to assert a right or position of his client."²⁹³ If the attorney general

erations in a proposed rule or standard. For example, when a regulation concerning the amount of pollutants that should be allowed to be discharged is involved, it may be difficult for the EPNRD to challenge the agency's decision since the agency will have conducted hearings on the matter.

289. Styka Interview, *supra* note 19; Christenson, *supra* note 3, at 311-15.

290. Styka Interview, *supra* note 19.

291. MICH. COMP. LAWS ANN. § 14.29 (1967).

292. H. CUMMINGS & C. MCFARLAND, *FEDERAL JUSTICE* 510 (1937), *quoting* *FTC v. Claire Co.*, 274 U.S. 160, 174 (1927):

The Attorney General and the officers of the Department of Justice are charged with no such simple duty as requires merely interpretation, prosecution, or defense at the behest of public administrators. In the words of the Supreme Court, they have the *duty*—not merely the power—of examining the "scope and propriety" of administrative action and of "sifting out" that which is pertinent and lawful before asking the courts to adjudge. Moreover, says the nation's highest tribunal, the wide scope and variety of these questions "show the wisdom of requiring the chief law officer of the Government to exercise a sound discretion."

See also Christenson, *supra* note 3, at 314.

293. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(B)(1) (1970). These dis-

determines that the public interest would be harmed, he has not only the right but the duty to refuse to handle the case.²⁹⁴

A third area of attorney general activity should be the initiation and promotion of legislation. The most obvious need for effort in this regard is in the support of legislation that would increase the resources available to the attorney general's office. The office cannot now seek out cases because of the shortage of personnel²⁹⁵ and must, on occasion, fail to take action on problems of which it is aware.²⁹⁶ As one of the agencies charged with the enforcement of the law, the attorney general's office should accept some of the responsibility for securing appropriate funds for itself and for other agencies.²⁹⁷

disciplinary rules were adopted by the Michigan Supreme Court in 1971. 385 Mich. 1vi (1971). See also ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(B)(2) (1970) (A lawyer may "[r]efuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal."); Christenson, *supra* note 3, at §13-14.

294. See ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1970): "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair." An interesting question arises as to whether the attorney general should authorize the state agency to secure outside counsel to handle the case. While this would lessen the impact of his refusal to represent the agency, the attorney general should allow the agency to secure the outside counsel for the purposes of the one case and then intervene on the other side to oppose the agency's position. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) (1970): "[A] lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled"

295. Bladen Interview, *supra* note 154; Freeman Interview, *supra* note 199.

296. See note 199 *supra*.

297. The attorney general's efforts to secure additional funds has met with little success in the past. For example, the following table shows the results of his efforts to obtain more assistant attorneys general:

NONCLERICAL POSITIONS

	Consumer Protection*		Licensing & Regulation		Environmental Protection	
	Total	New	Total	New	Total	New
1972-73						
Requested	8	2	6	2	14	8
Governor Recommended	6	0	5	1	8	2
Final Appropriation	6	0	5	1	9	3
1973-74						
Requested	6	2**	7	2	12	3
Governor Recommended	6	0	5	0	9	0
Final Appropriation	6	0	6	1	9	0
1974-75						
Requested	10	4	11	5***	9	0
Governor Recommended	6	0	6	0	9	0

*Includes both attorney and investigator positions.

**Supplemental request made on March 6, 1973, after initial Budget Request.

***Includes 3 attorneys to act as drug diversion task force.

Letter from Ronald J. Styka, Assistant Deputy Attorney General, Michigan Attorney General's Office, to *Michigan Law Review*, March 27, 1974.

The attorney general should also initiate and support particular pieces of legislation that would provide better substantive law in the consumer protection area, where the attorney general's activities are now limited because of the lack of a comprehensive consumer protection act. While the office has been supporting the passage of such a bill for the past several years,²⁹⁸ the political climate in the legislature, among other things, has prevented its passage.²⁹⁹ Because of the limited resources available to the attorney general, his present activities are episodic in nature. No comprehensive attack on consumer and environmental problems can be sustained without the proper legislative support. Thus, the legislature and the public are more to blame than the attorney general. In any case, the attorney general should allocate a portion of the resources available to him toward securing the approval of needed funds and legislation. In the immediate future a substantial investment of resources into a program of legislative lobbying, even to the point of employing a lobbyist, could result in the establishment of a solid foundation for effective consumer and environmental protection.

The final area of activity for the attorney general should be education;³⁰⁰ no program of consumer or environmental protection can be effective without an aware public.³⁰¹ Through education, the attorney general can provide for the protection of the public interest in the most efficient way possible.

An educated public will help the attorney general's program of protection in other ways. In a law enforcement system that, because of its limited resources, must rely upon public complaints, the public must have the capacity both to recognize problems and to report those problems to the proper law enforcement agency. Therefore, the education programs must be aimed not only at informing the public of its rights but also at informing it of how it should seek redress of violations of those rights.³⁰²

298. Bladen Interview, *supra* note 154. The attorney general's office did play a major role in the initiation and passage of the Land Sales Act, MICH. COMP. LAWS ANN. §§ 565.801-835 (Supp. 1973), and the Home Sales Act, MICH. COMP. LAWS ANN. §§ 445.111-117 (Supp. 1973). Styka Interview, *supra* note 19.

299. The Michigan House of Representatives passed a new act to protect consumers, Mich. H.B. 4001, by a 71 to 35 margin. Detroit Free Press, Jan. 31, 1974, at 3-A, col. 6 (3-star ed.). However, the bill faces an uncertain fate in the Michigan Senate. See Detroit Free Press, Feb. 2, 1974, at 3-A, col. 4 (metro ed.) (description of successful efforts by the Senate Republicans to assign the bill to the conservative Senate Judiciary Committee, which killed such a bill two years ago).

300. For discussion of the role education should play in an attorney general's program, see OFFICE OF ATTORNEY GENERAL, *supra* note 11, at 421-22; Burch, *supra* note 3, at 163-64; O'Connell, *supra* note 3, at 236-37; Saxbe, *supra* note 3, at 906-08.

301. See Note, *supra* note 49, at 1479, which showed that the level of public knowledge of consumer law is low: "Few, if any, of the factors studied—general education level, income, newspaper readership, consumer experience—had a strong correlation with knowledge of consumer rights."

302. A survey of public interest groups, which should be among the best informed

An education program may help the protection effort in two other ways. First, if the public has an increased awareness and knowledge of consumer and environmental problems, it will be more likely to pressure the legislature to approve the proper substantive legislation and to allocate the necessary funds. Second, increased knowledge and awareness of problems may result in increased private litigation, which may in turn lead to an increased receptivity on the part of courts to environmental and consumer problems.³⁰³ In addition, private litigation of these problems would decrease the workload of the attorney general's office, again allowing it to reallocate some of its resources to other activities. As previously mentioned, the Michigan attorney general's office is involved in some public education programs. These programs are sound as far as they go, but more are needed. The attorney general should develop a full program under the supervision of a consumer education specialist. Perhaps the two most promising avenues are public relations work in the media and intensive programs for school children.

Activities in the four areas discussed above—litigation, policy making, legislation, and education—should result in an effective program of consumer and environmental protection. One final suggestion encompasses all four areas. The attorney general's office should, to the greatest extent possible given its limited resources, shift from its present reliance on citizen complaints and agency referrals to a program involving affirmative action by the attorney general. Reliance on citizen complaints is an effective method of dealing with the problems only to the extent that the complaints received by the office represent a comprehensive cross section of the problems within the state.³⁰⁴ Lower-income persons are distrustful of the law to the point that they are reluctant to rely on the law and its officials to seek redress of their rights:³⁰⁵ "The poor cannot

groups of citizens, indicates that more than half of those groups responding do not rely upon the attorney general's office. The response letters are on file with the *Michigan Law Review*.

303. For an example of a judicial response to a need of the public to secure relief, see Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980 (1957), where the author describes the history of equity's recognition of a need for derivative suits and the subsequent evolution of mechanisms to allow them. The author concluded "that the origin of the derivative suit, as indeed of any non-statutory type of action, lies in judicial recognition of a new wrong or maladjustment for which pre-existing legal procedure proved more or less inadequate." *Id.* at 992.

304. *Developments in the Law—Deceptive Advertising*, *supra* note 235, at 1126. A system that basically relies on consumer complaints requires a knowledgeable public that is willing to report violations of the law. However, a recent study has shown, "the level of citizen knowledge of criminal law is fairly high and that of consumer law is fairly low." Note, *supra* note 49, at 1479. With this low level of citizen knowledge of consumer law, the Michigan attorney general cannot expect real results unless a massive increase in public knowledge is brought about through public education programs or unless the office shifts to an initiative approach.

305. W. MAGNUSON & J. CARPER, *supra* note 1, at 8-9, 54. The reasons for this re-

conceive of getting justice from a law which has so viciously exploited them in the past."³⁰⁶ However, it is often these lower-income persons who bear the brunt of harmful activities, especially unfair and deceptive consumer practices. The attorney general should establish a monitoring system that reviews possible areas of violations, such as media advertisements.³⁰⁷

luctance to rely upon governmental officials can be seen in the remarks of former United States Attorney General Nicholas Katzenbach. In a speech before the National Conference of Law and Poverty in 1965, Mr. Katzenbach commented:

More damaging, poverty breeds crime indirectly, because it breeds isolation from society and fundamental resentment against its laws and those who enforce them. . . .

Too often, the poor man sees the law only as something that garnishees his salary; that repossesses his refrigerator; that evicts him from his house; that cancels his welfare; that binds him to usury; or that deprives him of his liberty because he cannot afford bail. . . .

. . . The poor man has little reason really to believe [the law] is his guardian; he has every reason to believe it is an instrument of the other society, of the well-off, the well-educated, the well-dressed, and the well-connected. The poor man is cut off from this society—and from the protection of its laws. . . .

NATIONAL CONFERENCE ON LAW & POVERTY, PROCEEDINGS 63 (1965). As noted, the recent study of Michigan citizens' legal knowledge did not show any positive correlation between education and consumer knowledge, Note, *supra* note 49, at 1471, or between higher incomes and consumer knowledge. Note, *supra*, at 1472. If these conclusions are valid, the problems inherent in a system that relies on complaints will probably arise throughout the state but will be most severe in the lower-income areas where the public shows less willingness to report illegal activities to law enforcement agencies.

One possible method of increasing the representativeness of the complaints that reach the attorney general's office is to establish "field offices" throughout the state, especially in Detroit. These offices would encourage complaints in areas that normally do not report complaints by providing easily accessible opportunities to report. The Complaint Examiner in the Michigan Attorney General's office favors the establishment of such field offices in order to provide the inner-city citizen with an opportunity to complain and receive help. She estimates that only about 15 per cent of the consumer complaints received by the attorney general's office are from the City of Detroit. Wright Interview, *supra* note 155. See Burch, *supra* note 3, at 162 (describing Maryland's "storefront office" program). But see Saxbe, *supra* note 3, at 898 (establishment of field offices may cause a separation of already limited resources available to an attorney general's office and lead to concentration on local problems while concern with long-range problems is diminished).

The problem of shortages of funds can be partially offset by using federal funds that are available for the operation of local offices. For example, the Missouri Attorney General operates a federally funded consumer protection office in St. Louis. Letter from Harvey Tettlebaum, Chief Counsel, Consumer Protection Division, Missouri Attorney General's Office, Jefferson City, Missouri, to the *Michigan Law Review*, Sept. 20, 1973. Other states operating branch consumer protection offices include Alabama (1), Alaska (3), Arizona (1), California (14), Florida (3), Idaho (2), Illinois (20), Indiana (1), Louisiana (3), Maryland (2), Missouri (3), New Jersey (1), New York (7), Pennsylvania (7), Texas (5), and Wisconsin (2). State Programs, *supra* note 148, at 6-7. The risk of overconcentration on local problems can be overcome by a system of tracing and recording complaints in order to discern statewide problems. See generally Note, *Consumer Protection by the State Attorney General: A Time for Renewal*, 49 NOTRE DAME LAW. 410, 423-27 (1973).

306. W. MAGNUSON & J. CARPER, *supra* note 1, at 54.

307. D. CAPLOVITZ, *supra* note 1, at 105-36; W. MAGNUSON & J. CARPER, *supra* note 1; Comment, 68 MICH. L. REV. 926, *supra* note 1, at 926-27.

Reliance on agency referrals is likewise effective only to the extent that the agencies themselves receive complaints about a comprehensive cross section of the problems within the state, the agencies are adequately staffed and budgeted, and the agencies remain immune from political pressures. In order to discern the problems affecting less vocal groups, the attorney general must inform himself of the activities occurring in, for example, the inner city in Detroit. This can be done by establishing field offices.³⁰⁸ The establishment of an affirmative program would allow the attorney general to provide more effectively for consumer and environmental protection throughout the state.

IV. FINDINGS AND RECOMMENDATIONS

The Michigan attorney general's office is taking an active role in both the consumer and environmental protection areas, and in many ways the office should be a model for other states' attorneys general. However, significant improvements can be made by both the legislature and the attorney general himself: (1) While the attorney general's office is properly structured for protection of the public interest,³⁰⁹ it is insufficiently funded.³¹⁰ Both consumer protection activities³¹¹ and environmental protection activities³¹² are limited by inadequate resources. (2) While Michigan statutes provide a measure of protection for the consumer,³¹³ the lack of a comprehensive consumer protection bill severely hinders the attorney general's efforts.³¹⁴ As the state legislature has been unwilling to pass such an act the attorney general's office should allocate the resources necessary to secure passage of a comprehensive bill.³¹⁵ The attorney general does have adequate substantive power to protect the environment.³¹⁶ (3) The attorney general should establish a system under which the activities of the state's governmental units are centralized in the attorney general's office, but where the local units will still be able to act, in order to provide maximum protection for Michigan citizens.³¹⁷ The office presently lacks a formal system for the receiving, recording, and reviewing of reports from local prosecutorial officers.³¹⁸ (4) The attorney general is forced, be-

308. See note 305 *supra*.

309. See text accompanying note 146 *supra*.

310. See text accompanying notes 147-49 *supra*.

311. See note 155 *supra*; text accompanying notes 183-86 *supra*.

312. See note 199 *supra*.

313. See text accompanying notes 42-88 *supra*.

314. See text accompanying note 55 *supra*.

315. See text accompanying notes 295-99 *supra*.

316. See text accompanying notes 89-145 *supra*.

317. See text accompanying notes 224-48 *supra*.

318. See text accompanying notes 244-48 *supra*.

cause of inadequate resources, to rely on complaints and agency referrals. This reliance inhibits the attorney general's ability to recognize or discover the more serious problems.³¹⁹ To remedy this problem, the attorney general should establish a monitoring system³²⁰ and should allocate the resources necessary to establish field offices in Detroit and other population centers.³²¹ In addition, an intensive public education program should be established.³²² (5) In the area of litigation, formal guidelines should be established to facilitate the exercise of the attorney general's discretion.³²³ In addition, civil actions should be favored over criminal actions.³²⁴ There is a serious postlitigation problem in that the attorney general lacks sufficient resources to operate a compliance check system.³²⁵ (6) The attorney general should increase the use of his powers to formulate and influence state policy.³²⁶ His use of advisory opinions to influence the policy of the state should be expanded,³²⁷ and care should be taken to ensure that requests for opinions are expeditiously handled.³²⁸ The attorney general should begin to use his power to review proposed administrative regulations with regard to substantive policy.³²⁹ He should begin cautiously to use his power to refuse to represent agencies and boards, in order to influence state policy.³³⁰
